

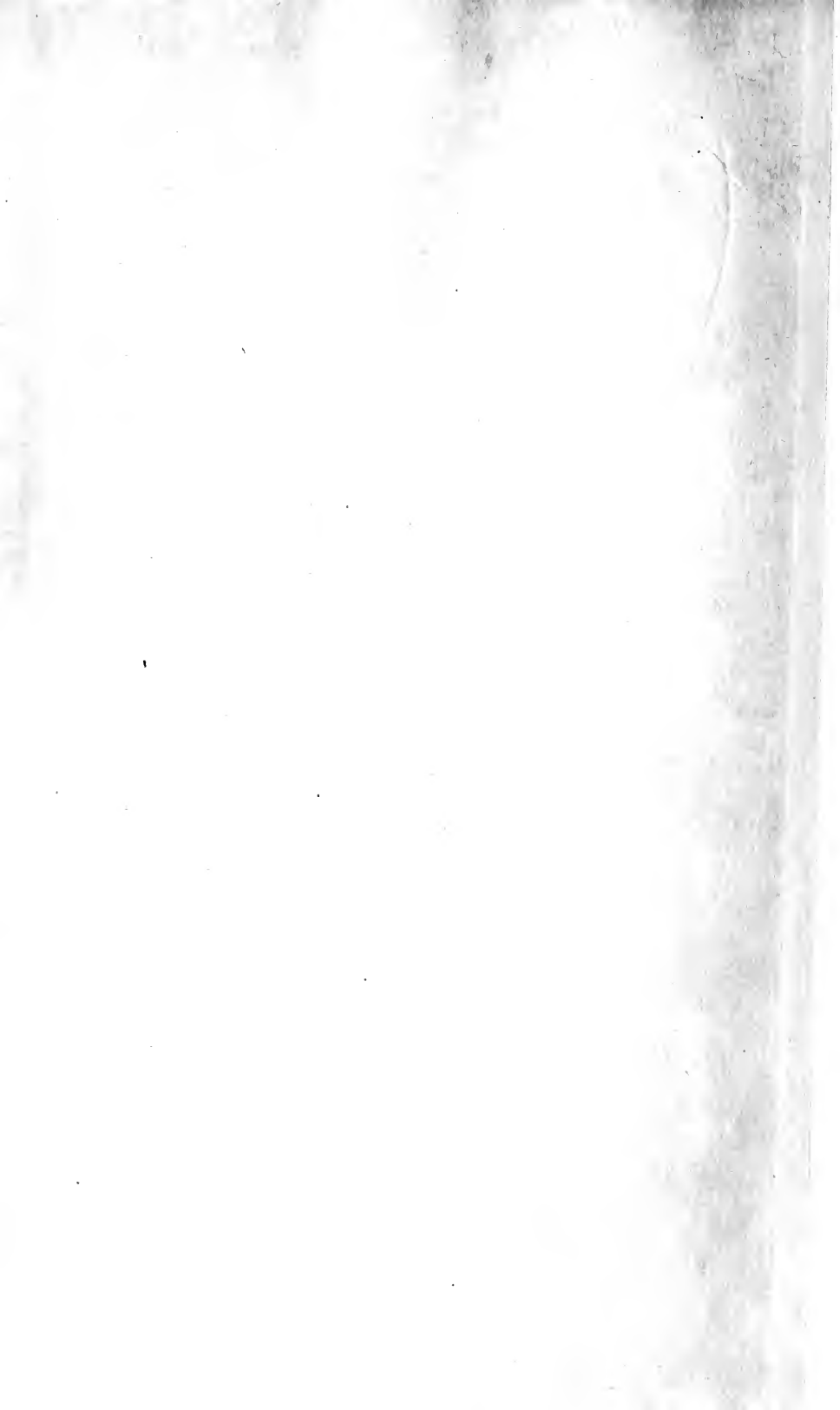
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No. 10550

United States, *Vol*
Circuit Court of Appeals

For the Ninth Circuit. *2368*

THOMAS H. WINGATE, as receiver in equity for
Pacific Empire Holdings, Incorporated, a cor-
poration of the State of Delaware,

Appellant,

vs.

PETER BERCUT, HENRI BERCUT, M. MAF-
FEI and L. R. ARNOLD,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 500

Upon Appeal from the District Court of the
United States for the Northern District
of California, Southern Division.

FILED

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19 Books.

No. 10550

United States
Circuit Court of Appeals

For the Ninth Circuit.

THOMAS H. WINGATE, as receiver in equity for
Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware,

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vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division Thereof.

Civil Action File No. 22339-W

THOMAS H. WINGATE, as Receiver in Equity
for Pacific Empire Holdings, Incorporated, a
corporation of the State of Delaware,
Plaintiff,

vs.

PETER BER CUT, ERNEST E. BER CUT,
HENRI BER CUT, JEAN BER CUT, MARY
DOE BER CUT, MARY JANE BER CUT, M.
MAFFEI, L. R. ARNOLD, FIRST DOE,
SECOND DOE, THIRD DOE, BLUE AND
WHITE, a corporation, XYZ, a copartnership,
Defendants.

COMPLAINT BY A RECEIVER TO DECLARE
A TRUST, TO IMPRESS PERSONAL
PROPERTY WITH A TRUST, FOR CLAIM
AND DELIVERY OF PERSONAL PROP-
ERTY, FOR DECLARATORY JUDGMENT
AND FOR DAMAGES ARISING OUT OF
CONVERSION OF PERSONAL PROP-
ERTY.

The jurisdiction of the above entitled court over this cause is founded on diversity of citizenship and amount. Plaintiff was, at the time of the commencement of this action, and still is a citizen and resident of the State of Delaware, and is a non-

resident of the State of California. Pacific Empire Holdings, Incorporated, at all times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and was, at the time of the commencement of this action, and now is a resident and citizen of said state and a non-resident of the State of California. Each of the defendants named in this complaint was, at the time of the commencement of this action, and still is a citizen and resident of the State of California and resides within the jurisdiction of this Court.

The matter in controversy exceeds, exclusive of interest [1*] and costs, the sum of \$3,000, all as hereinafter pleaded.

Plaintiff complains and for a First Cause of action alleges:

1. Pacific Empire Holdings, Incorporated (hereinafter designated as Pacific Empire) is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware. Its principal office in California is at the City and County of San Francisco.

2. On the 31st day of August, 1942, in the Court of Chancery of the State of Delaware in and for New Castle County, in that certain action of Rebecca Tanzer and Elizabeth Wilhelm, complainants, vs. Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, Defendant, upon proceedings being duly had in the above court pur-

*Page numbering appearing at foot of page of original certified Transcript of Record.

suant to provisions of Section 4407 of the Revised Code of Delaware of 1935, the said Pacific Empire Holdings, Incorporated, was adjudged and decreed to be insolvent in the equity sense, and Thomas H. Wingate, the plaintiff herein, of the City of Wilmington, State of Delaware, was appointed Receiver of Pacific Empire Holdings, Incorporated, with full power to take charge of the estate, effects, business and affairs thereof, to collect the outstanding debts due and belonging to the said Pacific Empire Holdings, Incorporated, and with power to prosecute and defend in the name of said Pacific Empire Holdings, Incorporated, or otherwise, all claims and suits. Said Thomas H. Wingate has qualified as such receiver of and for Pacific Empire Holdings, Incorporated, and he is now the duly appointed, qualified and acting receiver in equity for said corporation. A copy of said order of appointment is attached hereto, marked exhibit A. and incorporated herein by reference.

3. Under and pursuant to Section 4408 of the Revised Code of Delaware of 1935, now in full force and effect, said Thomas H. Wingate, as such receiver, has been and now is vested with the title of said Pacific Empire Holdings, Incorporated, a corporation, to all its books, papers and documents, interests in patents, patent rights, copyrights, and trade-marks, rights of action arising upon contract or from the unlawful taking or detention of or injury to property of such corporation, and other property, real, personal or mixed of whatever nature,

kind, class or description, and wheresoever situate, except real estate situate outside of the State of Delaware. Said receiver files this [2] action, as such receiver, and for the benefit and protection of said Pacific Empire Holdings, Incorporated, its stockholders and creditors, many of whom are located in the State of California.

4. Pacific Empire was originally incorporated under the laws of the State of Delaware with the name of Associated Calitalo Holdings, Ltd. Inc., on the 17th day of May, 1934, by amendment to its certificate of incorporation duly made in accordance with the law, its corporate name was changed to Pacific Empire Holdings, Incorporated. As of this day Pacific Empire Holdings, Incorporated, has outstanding 2,500,000 shares of common stock of a par value of ten cents (10¢) a share owned by approximately 10,000 stockholders. It has aggregate liabilities in excess of \$250,000. Its principal activities have at all times been conducted in California within the jurisdiction of this court.

5. Continuously since approximately the year 1931, up to and including August 20, 1942, defendants M. Maffei, Peter Bercut and L. R. Arnold were, and each of them was a director and member of the executive committee of Pacific Empire and said defendants were, respectively, the President, Vice-President and Vice-President-Secretary of said corporation. During all of said period of time, defendants M. Maffei, Peter Bercut and L. R. Arnold, and each of them, actively participated in the man-

agement of Pacific Empire and they were, and each of them was familiar with all matters and things appertaining to the condition and affairs of the corporation, especially with its financial condition and the nature of the properties it owned.

6. In 1931, or thereabouts, Pacific Empire acquired for the sum of approximately \$400,000, ownership of the majority of the outstanding stock of the Merchants Ice & Cold Storage Company, a California corporation, which latter corporation owned and operated an ice and cold storage business with its principal place of business at San Francisco, California. At various times thereafter and until December 31, 1940, Pacific Empire acquired ownership' of additional shares of stock of the Merchants Ice & Cold Storage Company. Between 1931 and December 31, 1940, in order to obtain funds to lend to Merchants Ice & Cold Storage Company to enable it to meet its obligations, to obtain funds with which to purchase the additional stock interest in Merchants Ice & Cold [3] Storage Company above referred to, and in order to meet its own obligations and operating expenses, Pacific Empire disposed other holdings and properties and at December 31, 1940, the only substantial assets of Pacific Empire were the following:

78,358 shares of capital stock of Merchants Ice & Cold Storage Company, consisting of 12,493 shares of preferred stock and 65,863 shares of common stock. The reasonable value of said shares at said time was \$1,000,000.

- 47½% or thereabouts of the outstanding capital stock of California Pacific Service Corporation, a California corporation, operating a laundry at Bakersfield, California. The reasonable value of said shares at said time was approximately \$25,000.00.

52% of the outstanding capital stock of Pacific Empire Corporation, a California corporation. The reasonable value of said shares at said time was approximately \$75,000.00.

At said time Pacific Empire had pledged to Pacific Empire Corporation, a California corporation, 3,990 shares of preferred and 49,944¼ shares of common of the total of 78,358 shares of stock of Merchants Ice & Cold Storage Company aforementioned as security for notes and accounts payable to Pacific Empire Corporation in the amount of \$136,855.34, or thereabouts. All of the other aforementioned assets of Pacific Empire were in pledge at said time to secure other obligations of Pacific Empire and in addition thereto, Pacific Empire owed other unsecured obligations of approximately \$100,000. The foregoing obligations were all due and payable and the only assets available for payment thereof were the assets specifically enumerated in this paragraph (6) hereof.

7. The Pacific Empire at said time, to wit, on or about December 31, 1940, had a board of directors consisting of seven directors. The said directors at said time were the following:

M. Maffei, A. A. Heer, L. R. Arnold, Luigi Giachino, Webb Richards, Peter Bercut, T. M. Ryerson.

At said time the said Pacific Empire had an executive committee consisting of three directors. At said time the said executive committee consisted of M. Maffei, L. R. Arnold and Peter Bercut. [4]

8. At said time, to wit, on or about December 31, 1940, the By-Laws of Pacific Empire then in full force and effect provided as follows:

Article IX of said By-Laws, dealing with the office of President, states:

“Section 1. Nature of Office. The President shall be the chief executive officer and head of the corporation and shall have general control and management of its business and affairs subject to the control of the board of directors.”

Article X of said By-Laws, dealing with the office of Vice-President, states:

“The Vice-President in the absence or inability to act of the President is vested with all the powers and shall perform all the duties of the President. If there be more than one vice-president, they shall be numbered and each shall act in the absence or inability to act of the president and of all vice-presidents preceding him in number. In such acts and in the execution of writings by such vice presidents, it shall not be necessary to recite the absence or inability of any preceding officer to act.”

Article XI of said By-Laws, dealing with the office of Secretary, states:

“Section 1. Nature of Office. The secretary *shall ex-officio*, secretary and clerk of the board of directors and secretary of all stockholders’ meetings and of the executive and of all other committees. He shall attend to all their sessions and shall record all votes and minutes of their proceedings in a book or books kept for that purpose.

“Section 2. Notes. He shall give or serve all notices required by law or the order of the president and all notices required of all meetings of the stockholders, directors and committees when not otherwise legally given. In case of his absence, inability, refusal or neglect so to do, then such notices may be given or served by any person thereunto directed by the president.

“Section 3. Certificate of Stock. He shall keep a book of blank certificates of stock, and shall fill out and countersign all certificates of stock issued, and make entries evidencing such issuance on the margin of said book.

“Section 4. Corporate Seal. He shall keep the corporate seal and he shall affix said seal to all papers requiring the affixation thereof, including certificates of stock.

“Section 5. Transfer Book. He shall keep a transfer book and a stock ledger in debit and credit form showing the number of shares

issued to and transferred by any stockholder and the dates of such issuance and transfer. [5]

“Section 6. Account Books. He shall keep proper account books, in debit and credit form, of all moneys received by or paid out by the corporation. He shall as often as required by the president make and file in the office of the company a trial balance sheet and shall as often as required make and file in the office of the company a balance sheet showing profits and losses of the company as appear by its books.

“Section 7. General Duties. He shall in general perform all other duties required by the president, directors or committees.

Article VI of said By-Laws, dealing with the duties of directors, sub-section 6 thereof, states:

“Management. The board of directors shall manage and control the business of the corporation.”

Article VII of said By-Laws, dealing with the duties of the executive committee, states:

“Section 1. Appointment. The directors may appoint an executive committee from their own number to consist of such number as they shall see fit.

Section 2. Powers. Any executive committee appointed by the board of directors shall have authority to exercise all the powers of the board of directors when said board is not in session, but subject to the immediate disaffirmance by

the board at its next meeting after receiving the report of the acts done by said committee. Such committee may act by the written consent of all its members although not formally convened.

Section 3. Removal. Members of this committee may be removed as such and their successors may be appointed by the board and said committee may be abolished at any time by the board of directors."

9. On Information and Belief.

On or about December 31, 1940, the defendant Peter Bercut, then and there a director, vice president and a member of the executive committee of Pacific Empire, and the defendant, M. Maffei, then and there the president, a director and a member of the executive committee of said corporation, and the defendant L. R. Arnold, then and there a vice president, the secretary, a director and member of the executive committee of said corporation, and each and all of the remaining defendants designated herein, then and there well knowing that said Pacific Empire was indebted to said creditors in said sums, and then and there well knowing that Pacific Empire was unable to pay its said obligations other than by a disposal or liquidation of the assets hereinbefore in [6] paragraph 6 hereof described, at said time, entered into a conspiracy with each other to acquire for themselves, for a nominal consideration, the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company

then and there owned by Pacific Empire, through the use of the position, power, influence and office of the said M. Maffei, L. R. Arnold and Peter Bercut in said Pacific Empire.

10. On Information and Belief:

At said time, to wit, December 31, 1940, the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company were and they are now reasonably worth the sum of \$1,000.00.

11. On Information and Belief:

In pursuance of said conspiracy, the defendants, M. Maffei, then and there purporting to act as President, and defendant, L. R. Arnold, then and there purporting to act as Secretary of Pacific Empire and defendant, Peter Bercut, then and there purporting to act in his individual capacity and not as an officer or director of Pacific Empire, did then and there purport to execute and enter into an agreement, a copy of which agreement is attached to this complaint, marked Exhibit B, and hereby specifically made a part hereof by reference.

12. On Information and Belief:

Pursuant to said purported agreement the defendant Peter Bercut, then and there purporting to act for himself, in his individual capacity, but in truth and in fact acting for and on behalf of himself and all the other defendants herein, did, on or about January 8, 1941, take possession of the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company then and there the property of Pacific Empire, and of which 53,934 $\frac{1}{4}$ shares were

then and there pledged to Pacific Empire Corporation, and did then and there, in accordance with the requirements of said purported agreement, pay to Pacific Empire, the sum of \$35,000 in cash, out of which sum \$25,000 was then and there paid over to Merchants Ice & Cold Storage Company by Pacific Empire. At no time was there ever held any meeting of the board of directors or of the executive committee of Pacific Empire for the purpose of acting upon, [7] ratifying or approving the said purported sale by the corporation to Peter Bercut of the said shares or any portion thereof and at no time, either prior to or after said transaction, was there ever submitted to the stockholders of Pacific Empire for their approval or consideration any sale by the corporation of the said or any part of said stock of Merchants Ice & Cold Storage Company to Peter Bercut or to anyone else.

At the time of the execution of the agreement, a copy of which is attached hereto as Exhibit B, and at the time of the delivery of the shares of stock of Merchants Ice & Cold Storage Company as herein alleged, defendants, and each of them, knew of the existence of the prior pledge of 53,934 $\frac{1}{4}$ of said shares to Pacific Empire Corporation as hereinbefore alleged, said defendants, and each of them, further knew that said pledge had never been released and was in full force and effect; defendants, and each of them, further knew that said pledged stock had been delivered to Pacific Empire Corporation by Pacific Empire and had been delivered to Pa-

cific National Bank of San Francisco by Pacific Empire Corporation; defendants, and each of them, further knew that their contemplated transaction would render Pacific Empire insolvent and its note to Pacific Empire Corporation valueless, whereby Pacific Empire Corporation would also be made insolvent and the stock thereof valueless. With knowledge of each and all of the foregoing facts, defendants obtained possession of the pledged shares and delivered them in furtherance of their conspiracy as hereinabove alleged, without the knowledge or consent of the pledgee, express or implied.

13. On Information and Belief:

The said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company taken in the manner aforesaid by said Peter Bercut are now held jointly by and between himself and the other defendants in proportion unknown to plaintiff. Said defendants claim and assert to be the owners of said shares, and by reason and as a result thereof the defendants have caused to be elected a new board of directors of Merchants Ice & Cold Storage Company and they and each of them, as the result of said transaction have denied to Pacific Empire any right or estate in said shares of Merchants Ice & Cold [8] Storage Company, or any voice in the management of said Merchants Ice & Cold Storage Company.

14. By reason of said transaction Pacific Empire was rendered insolvent and unable to meet its debts or other obligations and its creditors and stockhold-

ers were defrauded to the extent of the excess value of the shares of Merchants Ice & Cold Storage Company over the consideration paid, namely, \$965,000. Upon the appointment of Thomas H. Wingate as receiver for Pacific Empire, the said transaction was forthwith repudiated by him and written notice of said repudiation was immediately given to said Peter Bercut.

15. Plaintiff has made demand upon the defendants for the return of said shares of stock to plaintiff, but the defendants have refused to do so and plaintiff is informed, believes and alleges that said defendants, and each of them, will, unless restrained by this court, dispose of, alienate and secrete the said shares of stock, to the irreparable injury and damage of the creditors and stockholders of Pacific Empire.

16. Plaintiff hereby tenders to the defendants the consideration paid to Pacific Empire pursuant to said Letter Agreement dated January 8, 1941, purported to have been entered into between Pacific Empire and the defendant Peter Bercut as hereinbefore stated.

17. The names of the defendants sued herein as Mary Doe Bercut, Mary Jane Bercut, First Doe, Second Doe, Third Doe, Blue and White, a corporation, ZYX, a corpartnership, are fictitious, and plaintiff prays that when said true names shall have been ascertained said true names of said defendants may be inserted herein and in all proceedings hereafter in lieu thereof. [9]

As and by way of a Second Cause of action against the defendants and each of them, plaintiff alleges:

1. Plaintiff refers to and incorporates herein at length all of the allegations stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 17 of the first cause of action of this Complaint.

2. On or about January 8, 1941, Pacific Empire was the owner of 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company, a California corporation, consisting of 12,495 shares of preferred stock and 65,863 shares of common stock evidenced by the following certificates of stock, to wit, those certain certificates of stock particularly described in Exhibit "C" hereto attached.

3. The value of said 78,358 shares of stock of Merchants Ice & Cold Storage Company at said time was and now is \$1,000,000.

4. The said defendants and each of them on or about the 8th day of January, 1941, in the City and County of San Francisco, State of California, without plaintiff's consent or the consent of Pacific Empire, wrongfully, came into the possession of said 78,358 shares of stock of Merchants Ice & Cold Storage Company evidenced by the said certificates of stock particularly described in Exhibit "C" hereto attached, and still retain the possession of the same and the defendants and each of them now claim and assert to be the owners thereof.

5. Before the commencement of this action, to wit, on or about the 28th day of September, 1942,

plaintiff demanded of the defendants the return and possession of said shares of stock and personal property to plaintiff, but the defendants and each of them refuse to deliver the said shares or personal property to plaintiff and continue to unlawfully withhold the same from the possession of plaintiff to his damage in the sum of \$1,000,000.

6. The said personal property and shares of stock of Merchants Ice & Cold Storage Company have not been taken for a tax assessment or fine pursuant to a statute or seized under an execution or an attachment against the property of plaintiff.

[10]

As and by way of a Third Cause of action against the defendants and each of them, plaintiff alleges:

1. Plaintiff refers to and incorporates herein at length all of the allegations stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 17 of the first cause of action of this Complaint.

2. On or about January 8, 1941, plaintiff was the owner of 78,358 shares of stock of Merchants Ice & Cold Storage Company consisting of those certain certificates of stock particularly described in Exhibit "C" hereto attached.

3. The value of said 78,358 shares of stock of Merchants Ice & Cold Storage Company at said time was and now is \$1,000,000.

4. On or about January 8, 1941, the defendants and each of them converted to their own use and benefit the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company evi-

denced by the certificates of stock particularly described in Exhibit "C" hereto attached to plaintiff's damage in the sum of \$1,000,000.

5. On or about January 8, 1941, the defendants and each of them became indebted to plaintiff and now owe to plaintiff the sum of \$1,000,000, being the reasonable value of 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company, consisting of 65,863 shares of common stock and 12,495 shares of preferred stock then and there owned by plaintiff and then and there converted by the defendants and each of them to their own use and benefit.

Wherefore, plaintiff prays for judgment as follows:

1. That plaintiff be declared the owner and entitled to the possession of said 78,358 shares of stock of Merchants Ice & Cold Storage Company.

2. That the agreement dated January 8, 1941, purported to have been entered into between Pacific Empire and the defendant Peter Bercut be declared not to be the corporate act of or binding upon Pacific Empire or plaintiff herein.

3. That the defendants and each of them be adjudged to be the holders of all shares of stock of Merchants Ice & Cold Storage Company received by them and each of them through the defendant Peter Bercut, as the result of the [11] transaction herein complained of, in trust for the benefit of plaintiff; that they and each of them be ordered to deliver all of the said shares to plaintiff under such terms and

conditions as to the court may seem fair and equitable in the premises; that if delivery cannot be made, for any reason whatever, the defendants be ordered to pay to plaintiff the sum of \$1,000,000, being the value of said shares.

4. That the defendants and each of them be ordered to account for and pay over to plaintiff any profits or sums secured by them as the proximate result of the transaction herein complained of.

5. That the defendants and each of them, their agents, servants, employees and attorneys be restrained by the Court from alienating, hypothecating or transferring or parting with possession of any of said shares of stock and that they be ordered to pay to plaintiff the reasonable value of any of such shares as they may be no longer legally able to restore to plaintiff.

6. Such other, further and additional judgment, order or relief as may, to the court, be deemed just and reasonable in the premises, including costs of suit incurred herein.

7. For judgment against the defendants and each of them in the sum of One Million Dollars (\$1,000,000).

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

CONRAD T. HUBNER

Attorneys for Plaintiff.

Of Counsel for Plaintiff

IVAN CULBERTSON [12]

EXHIBIT "A"

In the Court of Chancery of the State of Delaware
in and for New Castle County

REBECCA TANZER and
ELIZABETH WILHELM,

Complainants,

vs.

PACIFIC EMPIRE HOLDINGS, INCORPORATED,
a corporation of the State of Delaware,
Defendant.

BILL FOR RECEIVER

And now, to-wit, this 31st day of August, A. D. 1942, the Bill of Complaint in the above entitled cause, with the Answer of the defendant admitting the allegations of said Bill and consenting to the granting of the relief prayed for, being duly presented, and it appearing therefrom that the defendant is a corporation organized and existing under the laws of the State of Delaware, that complainant is a creditor and stockholder thereof, that the defendant is insolvent in the equity sense, in that it is unable to pay its obligations as they mature in due course of business, that defendant is not a corporation for public improvement, and that the appointment of a Receiver or Receivers of said defendant by this Court would be for the benefit of its creditors and stockholders.

It is ordered, adjudged and decreed by the Chancellor that Thomas H. Wingate of the City of

Wilmington, State of Delaware, be and he is hereby appointed Receiver of Pacific Empire Holdings, Incorporated, the defendant herein, to take charge of the estate, effects, business and affairs thereof, [13] to collect the outstanding debts, claims and property due and belonging to the said defendant, with power to prosecute and defend in the name of said defendant, or otherwise, all claims and suits; to appoint an agent or agents under said Receiver, and, subject to the approval of the Chancellor, to do all other acts which might be done by said corporation that may be necessary and proper; and with power to compromise, adjust, and settle claims which the defendant has against any person, firm, or corporation, or which may be due to the defendant by any person, firm, or corporation;

And it is further ordered that said defendant, its President, directors, officers, agents, servants and attorneys be and they are each of them hereby restrained and expressly enjoined, until further order of the Chancellor, from receiving, collecting or compromising any debts due or belonging to defendant and from paying out, selling, assigning or transferring any property, estate, moneys, funds, lands, tenements or effects of any description whatsoever belonging to said defendant to any person other than the Receiver hereby appointed;

And it is further ordered that said defendant, its President, directors, officers, agents, servants and attorneys, shall forthwith deliver to said Receiver the property and effects thereof and all books, rec-

ords and papers touching the same and pertaining to its business and affairs in its or their possession or custody;

And it is further ordered that, pursuant to paragraph 4707, Section 41, of the Revised Code of the State of Delaware of 1935, said Receiver shall be and hereby is vested by operation [14] of law, without any act or deed, with the title of said defendant to all its books, papers and documents, interests in patents, patent rights, copyrights and trademarks, rights of action arising upon contracts or from the unlawful taking or detention of or injury to property of said defendant; and other property real, *person* or mixed, of whatsoever nature, kind, class or description, and wheresoever situate, except real estate situate outside of the State of Delaware;

And it is further ordered that said Receiver, within five days from this date, shall give bond in the usual form in the sum of Two Thousand Dollars (\$2,000) with surety approved by the Chancellor, conditioned for the faithful performance of his duties as such receiver, and National Surety Company, a corporation of the State of New York, is hereby approved as surety on said bond;

And it is further ordered that the Chancellor reserves the right to make such further order or orders, decree or decrees herein as to him shall seem proper.

(signed) WM. WATSON HARRINGTON
Chancellor [15]

In the Court of Chancery of the State of Delaware
in and for New Castle County

State of Delaware,
New Castle County—ss.

I, Anthony F. Emory, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of order signed by Chancellor August 31, A. D. 1942, appointing Thomas H. Wingate receiver of Pacific Empire Holdings Incorporated etc. as the same remains on file and of record of said court; in the receivership cause of Pacific Empire Holdings, Incorporated, etc.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court at Wilmington, this 4th day of September, 1942.

ANTHONY F. EMORY

Register in Chancery [16]

EXHIBIT "B"

January 8, 1941

Mr. Peter Bercut
739 Market Street
San Francisco, Cal.

Dear Mr. Bercut:

The following will confirm our understanding and agreement relating to the sale to you by this corporation, Pacific Empire Holdings, Inc., of the con-

trolling shares of stock of Merchants Ice and Cold Storage Company, now owned by this corporation.

The purchase price, as agreed to be paid by Peter Bercut, is \$35,000.00, for which it is agreed that Peter Bercut is to receive, in accordance with the following conditions, the total of 78,358 shares of stock of Merchants Ice and Cold Storage Company, consisting of 12,495 shares of Preferred stock and 65,863 shares of Common stock.

It is agreed by this corporation that out of the proceeds of this sale, to-wit, \$35,000.00, the sum of \$25,000.00 will be paid by this corporation to Merchants Ice and Cold Storage Company. Out of the balance remaining, the sum of \$6,000.00 is to be remitted to Pacific National Bank, in order to secure the release from them of all stock of Merchants Ice and Cold Storage Company now on pledge as security for the obligations of the corporation to Pacific National Bank.

It is further understood and agreed that 5,516 $\frac{2}{3}$ shares of Preferred stock of Merchants Ice and Cold Storage Company, now held by California Baking Company as security for the balance owing by the corporation of \$4,100.00 is to be delivered to Peter Bercut when this obligation is paid.

It is understood and agreed by Peter Bercut that the corporation shall have the option to purchase, at 50¢ per share, all or any part of 20,000 shares of Common stock of Merchants Ice and Cold Storage Company within two years from date hereof. It is

understood that the corporation may obtain delivery of any portion of the 20,000 shares as paid for, from time to time, within the said two year period. It is further understood and agreed, in this connection, that all of the voting rights on the said 20,000 shares herein referred to shall remain with Peter Bercut for a period of seven years from date hereof, whether or not the said 20,000 shares are purchased by the corporation. All rights and privileges of Pacific Empire Holdings, Inc., in connection with the 20,000 shares of Common stock, hereinabove referred to are not assignable.

Yours very truly,

PACIFIC EMPIRE HOLDINGS,
INCORPORATED

By M. MAFFEI, Pres.

By L. R. ARNOLD, Secy.

Agreed and Accepted:

PETER BER CUT [17]

EXHIBIT "C"

SHARES OF MERCHANTS ICE & COLD STORAGE COMPANY OWNED BY
PACIFIC EMPIRE HOLDINGS, - INCORPORATED, AND DELIVERED TO
PETER BERCUT.

Cert. Nos.	No. Shares	Description	
		Merchants Ice & Cold Storage Co.	preferred
55	550	"	"
64	30	"	"
161	210	"	common
39	3,990	"	preferred
144	49,944 $\frac{1}{3}$	"	common
164	11,434	"	common
73	900	"	preferred
165	326 $\frac{2}{3}$	"	common
7	2,500	"	preferred
9	1,000	"	"
43	1,566 $\frac{2}{3}$	"	"
46	450	"	"
52	500	"	"
P77	10 (\$100 par)	"	(Wm. H. Roussel)
P250	20	"	(Marian Kershaw)
P511	10	"	(Marian Kershaw)
P512	10	"	(Mrs. W. H. Roussel)
P626	10	"	(Marian Kershaw)
P627	10	"	(Wm. H. Roussel)

In addition to the foregoing specific certificates, other certificates evidencing additional shares of Common and Preferred shares of Merchants Ice and Cold Storage were delivered to Peter Bercut. The numbers of these certificates and the number and class of shares evidenced by them are presently unknown to plaintiff but are known to the defendants.

[Endorsed]: Filed Oct. 20, 1942. [18]

[Title of District Court and Cause.]

ANSWER

Now come the defendants Peter Bercut, Ernest E. Bercut, Henri Bercut and Jean Bercut, and answering the complaint on file herein, admit, deny and allege as follows:

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations on page 1 of said complaint that plaintiff was at the time of the commencement of this action and still is a citizen and resident of the State of Delaware and a non-resident of the State of California, and deny said allegation upon said ground.

1. Answering the first cause of action set forth in said complaint, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2 and 3 thereof and basing their denial upon that ground, deny generally and specifically, each and

[19] every, all and singular the allegations therein contained.

2. Answering the allegations contained in paragraph 4 thereof, defendants are without knowledge or information sufficient to form a belief as to the truth of the averments that Pacific Empire Holdings, Inc. has 2,500,000 shares of common stock of a par value of 10¢ per share owned by approximately 10,000 shareholders, issued and outstanding, and that it has aggregate liabilities in excess of \$250,000.00, and basing their denial upon said ground, deny generally and specifically, each and every, all and singular the said allegations.

3. Answering the allegations contained in paragraph 5 thereof, these answering defendants admit that continuously since approximately the year 1931 up to and including August 20, 1942, the defendants M. Maffei and L. R. Arnold were, and each of them was a, director and member of the Executive Committee of Pacific Empire Holdings, Inc., a corporation, and that M. Maffei was president and L. R. Arnold was vice president and secretary of said corporation. These answering defendants deny that Peter Bercut since approximately 1931 up to and including August 20, 1942 was a director and member of the Executive committee and vice president of said corporation and in this behalf allege that on or about February 15, 1933, said Peter Bercut was elected and became a director of said corporation and that on or about February 19, 1935, defendant Peter Bercut became and was a member of the

Executive Committee of said corporation, and on or about March 28, 1933 was elected a vice president of said corporation. Defendants further admit that said Peter Bercut remained as a director, vice president and member of the Executive Committee of said corporation until on or about March 30, 1940. Defendants deny that during all of said period of time, M. Maffei, L. R. Arnold and Peter Bercut and each of them actively participated in the management of Pacific Empire Holdings, Inc., and that they and each of them were familiar with all matters and things appertaining to the condition and affairs of the corporation and especially with its financial condition and the nature of the properties it owned. In this regard, these answering defendants allege that during all of said period of time, the affairs of said corporation were actively managed, controlled and directed by M. Maffei and L. R. Arnold and that Peter Bercut took no active part in the management or direction of the [20] affairs of said corporation and/or the preparation of any financial statements in connection therewith or appertaining thereto.

4. a. Answering the allegations of paragraph 6 thereof, these answering defendants deny that in 1931, or thereabouts, Pacific Empire Holdings, Inc. acquired for approximately the sum of \$400,000.00 ownership of a majority of the outstanding stock of Merchants Ice & Cold Storage Company, a California corporation.

b. Defendants admit that at various times subsequent to 1931 to and including March 15, 1940, said corporation acquired ownership of shares of common and preferred stock of Merchants Ice & Cold Storage Company at prices varying upwards from $12\frac{1}{2}\text{¢}$ per share for common stock and \$1.00 per share for preferred shares and defendants allege that the total cost to Pacific Empire Holdings, Inc. for all of said shares so acquired did not exceed the sum of \$250,000.00.

c. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations that between 1931 and December 31, 1940, in order to obtain funds to lend to Merchants Ice & Cold Storage Company to enable it to meet its obligations, to obtain funds with which to purchase additional stock in said Merchants Ice & Cold Storage Company, and in order to meet its own obligations and operating expenses, Pacific Empire Holdings, Inc. disposed of its holdings and property, and at December 31, 1940, the only substantial assets of Pacific Empire Holdings, Inc. were the following:

78,358 shares of capital stock of Merchants Ice & Cold Storage Company, consisting of 12,493 shares of preferred stock and 65,863 shares of common stock. The reasonable value of said shares at said time was \$1,000,000.

47 $\frac{1}{2}$ % or thereabouts of the outstanding capital stock of California Pacific Service Corporation, a California corporation, operating a

laundry at Bakersfield, California. The reasonable value of said shares at said time was approximately \$25,000.00.

52% of the outstanding capital stock of Pacific Empire Corporation, a California corporation. The reasonable value of said shares at said time was approximately \$75,000.00.

and basing their denial upon that ground, generally and specifically, deny each and every, all and singular the said allegation. Defendants deny that said shares of Merchants Ice & Cold Storage Company had a reasonable value on [21] December 31, 1940 of \$1,000,000 and allege that said shares at said time were of a value not to exceed \$35,000.00.

d. These answering defendants deny that on December 31, 1940 or at any time subsequent to September 24, 1936 Pacific Empire Corporation, a California corporation, held in pledge or had a lien upon 3990 shares of preferred and 49,944 $\frac{1}{4}$ shares of common stock of Merchants Ice & Cold Storage Company, or any other shares of Merchants Ice & Cold Storage Company stock as security for notes and accounts payable to Pacific Empire Corporation, in the amount of \$136,855.34 or any amount thereof, or as security for any amount whatsoever.

e. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments that all of the other assets of Pacific Empire Holdings, Inc. were in pledge at said time to secure other obligations of Pacific Empire Hold-

ings, Inc. and that in addition thereto Pacific Empire Holdings, Inc. owed other unsecured obligations of approximately \$100,000.00 and that said obligations were all due and payable and the only assets available for payment thereof, were the assets specifically mentioned in paragraph 6 of the complaint on file herein and basing their denial upon that ground deny generally and specifically, all and singular said allegations.

5. Answering the allegations of paragraph 7 thereof, these answering defendants deny generally and specifically, each and every, all and singular, the said allegations. Further answering said allegations, these answering defendants allege that on or about December 31, 1940 the Board of Directors of Pacific Empire Holdings, Inc. consisted of six directors, namely, M. Maffei, A. A. Herr, Jr., L. R. Arnold, Luigi Giachino, Webb Richards and T. M. Ryerson, and at said time the said corporation had an Executive Committee composed of two members, namely, M. Maffei and L. R. Arnold.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 thereof, and basing their denial upon that ground, deny, generally and specifically, each and every, all and singular the allegations in said paragraph contained.

7. Answering the allegations of paragraph 9 thereof, defendants deny, generally and specifically, each and every, all and singular the allegations [22] in said paragraph contained.

8. Answering the allegations of paragraph 10 thereof, these answering defendants deny that the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company were on December 31, 1940 reasonably worth the sum of \$1,000,000.00 and allege in this behalf that said shares at said time were of a value not to exceed \$35,000.00. Deny that the said shares of said corporation were worth the sum of \$1,000,000.00 on or about October 20, 1942, the date of the filing of the complaint herein or at any time thereabouts or thereafter to the date hereof; and in this behalf allege that the exact value of said shares at said time is uncertain and unknown to defendants.

9. a. Answering the allegations of paragraph 11 thereof, defendants deny, generally and specifically, each and every, all and singular the allegations in said paragraph contained.

b. In this behalf these answering defendants allege that under and pursuant to the provisions of said agreement Exhibit B. defendant Peter Bercut purchased shares of stock of Merchants Ice & Cold Storage Company therein described for the sum of \$35,000.00 from Pacific Empire Holdings, Inc.

c. Defendants allege that said agreement Exhibit B. was duly, properly and legally, executed for and on behalf of said corporation, by M. Maffei as president, and L. R. Arnold as secretary, and that said agreement made and constituted an agreement of sale of said shares for and on behalf of said corporation to Peter Bercut. Said agreement and the

terms thereof were in all respects fair and equitable to the corporation, and said agreement was entered into after lengthy negotiations by and between the said corporation and the said Peter Bercut and upon a full disclosure of all facts relating thereto. The price paid for said shares to wit, the sum of \$35,000.00 was a fair and proper price for said shares and the said contract was in all respects beneficial to said corporation, was entered into under proper corporate authority by officers duly authorized to act for and on behalf of said corporation, and was and is fully binding upon said corporation.

10. a. Answering the allegations of paragraph 12 thereof, defendants deny generally and specifically, each and every, all and singular, the allegations in said paragraph contained. [23]

b. In this regard these answering defendants allege that Peter Bercut for and on his own behalf and for and on behalf of the defendant Henri Bercut purchased the shares of stock in Merchants Ice & Cold Storage Company therein described from Pacific Empire Holdings, Inc. for the sum of \$35,000.00. That said Pacific Empire Holdings, Inc. with \$25,000.00 from and out of the said sum of \$35,000.00 so paid, paid an indebtedness owing by it to Merchants Ice & Cold Storage Company.

c. Defendants Jean Bercut and Ernest E. Bercut have and claim no right, title or interest in or to said shares.

11. Answering the allegations of paragraph 13 thereof, these answering defendants admit that the

shares of Merchants Ice & Cold Storage Company referred to are now held and owned by Peter Bercut and Henri Bercut and allege that Jean Bercut and Ernest E. Bercut have and claim no right, title or interest in or to said shares or any part thereof.

12. Answering the allegations of paragraph 14 thereof, these answering defendants deny generally and specifically, each and every, all and singular the allegations in said paragraph contained.

Defendants admit that plaintiff herein delivered a purported notice of repudiation of said transaction to Peter Bercut prior to the institution of this action.

13. Answering the allegations of paragraph 15 thereof, these answering defendants deny generally and specifically, each and every, all and singular the allegations in said paragraph contained.

Defendants admit that plaintiff has made a demand on Peter Bercut for the return of said shares to plaintiff and deny each and every, all and singular the remaining allegations contained in said paragraph.

As and for an answer to the second cause of action set forth in said claim, these answering defendants admit, deny and allege as follows:

1. Answering the allegations of paragraph 1 thereof, defendants incorporate herein by reference, their answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 17 of the first cause of action of the complaint on file herein, as if said answers were herein set forth in full. [24]

2. Answering the allegations of paragraph 3 thereof, these answering defendants deny that the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company were on or about January 8, 1941, reasonably worth the sum of \$1,000,000.00 and allege in this behalf that said shares at said time were of a value not to exceed \$35,000.00. Deny that the said shares of said corporation were worth the sum of \$1,000,000.00 on or about October 20, 1942, the date of the filing of the complaint herein, or at any time thereabouts or thereafter to the date hereof; and in this behalf allege that the exact value of said shares at said time is uncertain and unknown to defendants.

3. Answering the allegations of paragraph 4 thereof, these answering defendants deny generally and specifically, each and every, all and singular the allegations in said paragraphs contained.

4. Answering the allegations of paragraph 5 thereof, these answering defendants admit that plaintiff demanded delivery of said shares from Peter Bercut on or about September 28, 1942, and that Peter Bercut refused to deliver the said shares to plaintiff. Defendants deny that said shares were unlawfully and erroneously withheld from the possession of plaintiff to his damage in the sum of \$1,000.00 or any part thereof or in any sum whatsoever.

As and for an answer to the third cause of action set forth in said complaint, these answering defendants admit, deny and allege as follows:

1. Answering the allegations of paragraph 1 thereof, defendants incorporate herein by reference, their answers to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 17 of the first cause of action of said complaint on file herein, as if said answers were herein set forth in full.

2. Answering the allegations of paragraph 3 thereof, these answering defendants deny that the said 78,385 shares of the capital stock of Merchants Ice & Cold Storage Company were on or about January 8, 1941, reasonably worth the sum of \$1,000,000.00 and allege in this behalf that said shares at said time were of a value not to exceed \$35,000.00. Deny that the said shares of said corporation were worth the sum of \$1,000,000.00 on or about October 20, 1942, the date of the filing of the complaint herein, or at any time thereabouts or thereafter to the date hereof; and in this behalf allege that the [25] exact value of said shares at said time is uncertain and unknown to defendants.

3. Answering the allegations of paragraphs 4 and 5 thereof, these answering defendants deny generally and specifically, each and every, all and singular the allegations in said paragraphs contained. Deny that defendants or any of them became indebted and/or owe to plaintiff the sum of \$1,000,000.00 or any part thereof or any amount whatsoever.

I.

As and for a first, separate and special defense to the complaint on file herein and to each and all of

the causes of action therein set forth, these answering defendants allege:

1. That said complaint on file herein fails to state a claim upon which relief can be granted against these defendants.

2. That the first cause of action set forth in said complaint fails to state a claim upon which relief can be granted against these defendants.

3. That the second cause of action set forth in said complaint fails to state a claim upon which relief can be granted against these defendants.

4. That the third cause of action set forth in said complaint fails to state a claim upon which relief can be granted against these defendants.

5. That the said complaint on file herein, and each and all of the causes of action therein set forth fail to state a claim upon which relief can be granted against these defendants, in that it appears therefrom that Pacific Empire Corporation claims some right, title or interest in and to the shares of Merchants Ice & Cold Storage Company, the subject of this action and is therefore a necessary party to the determination of this action.

II.

As and for a second, separate and special defense to the complaint on file herein and to each and all of the causes of action therein set forth, these answering defendants allege:

1. That plaintiff has not the legal capacity to sue herein. [26]

III.

As and for a third, separate and special defense to the complaint on file herein, and to each and all of the causes of action therein set forth, these answering defendants allege:

1. That the contract, Exhibit B attached to the complaint at all times from and after its execution, was and still is in full and legal force and effect between the parties and that the said contract has not been lawfully rescinded or modified in any respect whatsoever.

IV.

As and for a fourth, separate and special defense to the complaint on file herein, and to each and all of the causes of action therein set forth, these answering defendants allege:

1. That each and all of the causes of action set forth in the complaint is, and are, barred by laches.

In this respect defendants allege that at the time of the execution of the contract Exhibit B attached to the complaint the said Merchants Ice & Cold Storage Company was in an insolvent condition, that it had no funds with which to meet its payrolls and was about to collapse financially and that said circumstances were at said time fully known to Pacific Empire Holdings, Inc. and to its officers, directors and stockholders and to the general public. Defendants further allege that the execution of the contract Exhibit B, attached to the complaint, by the defendant Peter Bercut and by Pacific Empire Holdings, Inc., and all of the facts and circum-

stances relating thereto were at said time fully known to the said Pacific Empire Holdings, Inc. its officers, directors and stockholders and were a matter of public knowledge. The sum of \$35,000.00 paid for said shares by Peter Bercut was a fair and generous price and in excess of the value of said shares in the market at and about the time of the making of said contract.

That the defendant Peter Bercut promptly and immediately performed all of the terms and conditions of the contract Exhibit B required to be performed by him and thereupon and immediately thereafter assumed the presidency and management of the Merchants Ice & Cold Storage Company and has [27] continuously since the said 8th day of January 1941 devoted himself and his financial resources to the rehabilitation and development of the business of the said Merchants Ice & Cold Storage Company. As a result thereof the said Merchants Ice & Cold Storage Company has and had at and about the time of the filing of the complaint herein, a large and active business and is and was then operating upon a profitable basis. The acts of the said defendant Peter Bercut in this connection have been open and overt and at all times since January 8, 1941, have been fully known to the officers, directors and stockholders of the said Pacific Empire Holdings, Inc. and at all times since the said 8th day of January, 1941, the said Pacific Empire Holdings, Inc. its officers, directors and stockholders have been fully aware of the acts and conduct of

the said Peter Bercut in building up and developing the business of the said Merchants Ice & Cold Storage Company, in reliance upon his ownership of the shares of the Merchants Ice & Cold Storage Company purchased by him under the terms of the contract, Exhibit B. As a result thereof the shares of Merchants Ice & Cold Storage Company purchased by Peter Bercut have greatly appreciated and enhanced in value.

V.

As and for a fifth, separate and special defense to the complaint on file herein, and to each and all of the causes of action therein set forth, these answering defendants allege:

1. These answering defendants incorporate herein all the allegations set forth in their fourth special and separate defense.

2. That by reason of the matters and things herein set forth, Pacific Empire Holdings, Inc., a corporation, plaintiff's predecessor, and plaintiff, have acquiesced in and consented to the execution of the contract, Exhibit B, attached to the complaint, by and between Peter Bercut and Pacific Empire Holdings Inc. and have acquiesced and consented to the acts and conduct of Peter Bercut in reliance upon said contract as hereinbefore alleged, and by reason of such acquiescence and conduct on their part are estopped from denying or questioning the validity of said contract. [28]

Wherefore, defendants pray that the complaint on file herein be dismissed; that judgment be en-

tered herein against plaintiff and in favor of these answering defendants for their costs of suit incurred herein.

Dated: December 14, 1942.

LOUIS E. GOODMAN
LOUIS H. BROWNSTONE
GOODMAN & BROWNSTONE
Attorneys for Defendants Peter
Bercut, Ernest E. Bercut, Henri
Bercut and Jean Bercut.

Receipt of Service.

[Endorsed]: Filed December 19, 1940. [29]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS M. MAFFEI
AND L. R. ARNOLD

Come now defendants M. Maffei and L. R. Arnold, and for answer to the complaint of plaintiff on file herein, admit, deny and allege as follows, to wit:

I.

These defendants are without, and have not, sufficient knowledge, information or belief as to the truth of the allegations set forth in Paragraphs II, III, IV, VI and XIV in the first cause of action contained, each and every part thereof, and placing their denial on said grounds deny the said allegations of said paragraphs of said cause of action in said complaint.

II.

These defendants deny the allegations set forth in Paragraphs IX, X, XI, XII, XIII and XV in the said first cause of action in said complaint contained, each and every part thereof. [30]

III.

That said first cause of action in said complaint of plaintiff does not state facts sufficient to constitute a cause of action against these defendants, or either of them, or at all.

Wherefore, these defendants pray judgment that plaintiff's complaint be dismissed; that plaintiff take nothing by reason of his complaint on file herein; and that these defendants be hence dismissed with their costs of suit herein incurred.

And for answer to the second cause of action, these defendants admit, deny and allege as follows, to wit:

I.

These defendants are without, and have not, sufficient knowledge, information or belief as to the truth of the allegations set forth in Paragraphs II, III, IV and VI of the first cause of action, incorporated by reference in Paragraph I of the second cause of action in said complaint contained, and Paragraph VI of the second cause of action in said complaint contained, and placing their denial on said grounds deny the allegations of said paragraphs in said second cause of action in said complaint contained.

II.

Deny the allegations of Paragraphs IV and V of the second cause of action in said complaint contained, each and every part thereof.

III.

That said second cause of action in said complaint of plaintiff does not state facts sufficient to constitute a cause of action against these defendants, or either of them, or at all.

Wherefore, these defendants pray judgment that plaintiff's complaint be dismissed; that plaintiff take nothing by reason of his complaint on file herein; and that these defendants be hence [31] dismissed with their costs of suit herein incurred.

And for answer to the third cause of action, these defendants admit, deny and allege as follows, to wit:

I.

These defendants are without, and have not, sufficient knowledge, information or belief as to the truth of the allegations set forth in Paragraphs II, III, IV and VI of the first cause of action, incorporated by reference in Paragraph I of the third cause of action in said complaint contained, and Paragraph III of the third cause of action in said complaint contained, and placing their denial on said grounds deny the allegations of said paragraphs in said third cause of action in said complaint contained.

II.

These defendants deny the allegations set forth in Paragraphs II, IV and VI in the said third cause of action in said complaint contained, each and every part thereof.

III.

That said third cause of action in said complaint of plaintiff does not state facts sufficient to constitute a cause of action against these defendants, or either of them, or at all.

Wherefore, these defendants pray judgment that plaintiff's complaint be dismissed; that plaintiff take nothing by reason of his complaint on file herein; and that these defendants be hence dismissed with their costs of suit herein incurred.

J. A. PARDINI &
ELDA GRANELLI

Attorneys for Defendants M. Maffei
and L. R. Arnold [32]

State of California,
City and County of San Francisco—ss.

M. Maffei, being first duly sworn, deposes and says:

That he is one of the defendants in the above-entitled action; that he has read the foregoing answer to complaint and knows the contents thereof; that the same is true of his own knowledge, save and except as to those matters which are therein stated on information or belief and as to those matters he believes it to be true.

M. MAFFEI

Subscribed and sworn to before me, this 30th day of December, 1942.

[Seal]

JOHN F. BURNS

Notary Public in and for the City and County of San Francisco, State of California. My Commission expires April 12, 1945.

[Endorsed]: Filed Dec. 31, 1942. [33]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER AND
COUNTERCLAIM

Now come defendants, Peter, Ernest E., Henri and Jean Bercut, and by written consent of the adverse party and order of Court first had and obtained, amend their answer filed herein and for a sixth separate and special defense to the complaint on file herein, and to each and all of the causes of action therein [34] set forth and by way of counterclaim, allege as follows:

(1) That pursuant to the terms of that certain agreement by and between Peter Bercut and Pacific Empire Holdings, Incorporated dated January 8, 1941, a copy of which is attached to the complaint on file herein and marked Exhibit B, Peter Bercut, for and on his own behalf and for and on behalf of defendant, Henri Bercut, purchased from the said corporation 78,358 shares of stock of Merchants Ice & Cold Storage Company, consisting of 12,495 shares of Preferred stock and 65,863 shares of Com-

mon stock for the total purchase price of \$35,000.00.

(2) On or about said date the said Peter Bercut paid to said corporation the sum of \$35,000.00, the full purchase price for said shares, and said Peter Bercut has fully performed each and all of the terms, covenants, agreements and conditions required to be performed by him under the terms, provisions and conditions of said agreement.

(3) Pursuant to said agreement the said corporation delivered to Peter Bercut on account of the shares so sold, 6,670 shares of Preferred stock and 62,341 shares of Common stock of Merchants Ice & Cold Storage Company. In order to obtain possession of $5,516\frac{2}{3}$ shares of Preferred stock so sold and at the express instance and request of Pacific Empire Holdings, Incorporated, on or about April 1, 1941 defendants, Peter and Henri Bercut, were compelled to, and did, advance and expend the sum of \$3,950.00 in payment of a claim against Pacific Empire Holdings, Incorporated, secured by a pledge of said $5,516\frac{2}{3}$ shares, and the said corporation promised and agreed in writing to repay said sum.

(4) Subsequent to January 8, 1941 and as aforesaid, Pacific Empire Holdings, Incorporated delivered to Peter Bercut $12,186\frac{2}{3}$ shares of Preferred stock and 62,341 shares of Common [35] stock of Merchants Ice & Cold Storage Company. Pursuant to the terms and provisions of the agreement dated January 8, 1941 the said corporation has failed and refused to deliver to Peter Bercut the balance of $308\frac{1}{3}$ shares of Preferred stock and $2,047\frac{1}{3}$ shares.

of Common stock of Merchants Ice & Cold Storage Company required to be delivered thereunder.

Defendants, Peter and Henri Bercut, and each of them, have demanded payment of the sum of \$3,950.00 and delivery of $308\frac{2}{3}$ shares of Preferred stock and $2,047\frac{1}{3}$ shares of Common stock of Merchants Ice & Cold Storage Company, of and from plaintiffs but said plaintiffs have failed and refused to pay said sum or any part thereof, save and except the sum of \$100.00, or to deliver said shares, or any part thereof, to said defendants, or either of them.

Wherefore, these defendants, and each of them, pray that the complaint on file herein be dismissed, that judgment be entered herein in favor of defendants, Peter and Henri Bercut, and against plaintiffs for the sum of \$3,850.00, and interest thereon, and for the delivery of $308\frac{2}{3}$ shares of Preferred stock and $2,047\frac{1}{3}$ shares of Common stock of Merchants Ice & Cold Storage Company, or if such delivery cannot be had, for the value thereof, for their costs of suit incurred herein and for such other and further relief as may be proper.

Dated: April 9, 1943.

LOUIS H. BROWNSTONE

Attorney for Defendants,
Peter, Ernest E., Henri
and Jean Bercut. [36]

It is hereby stipulated by and between the parties hereto that the foregoing amendment to answer and counterclaim may be deemed denied generally and specifically by the plaintiff as to each and every allegation therein contained and, further, that it may be deemed denied by the plaintiff that Pacific Empire Holdings, Incorporated, is in any way indebted for any amount whatever to Peter Bercut, Ernest E. Bercut, Henri Bercut or Jean Bercut as alleged by them in their said amendment to answer and counterclaim.

It is further stipulated that said amendment to answer and counterclaim with this stipulation may be filed herein.

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

CONRAD T. HUBNER

Attorneys for Plaintiffs

LOUIS H. BROWNSTONE

Attorney for Defendants

Peter, Ernest E., Henri
and Jean Bercut.

So Ordered.

MICHAEL J. ROCHE

District Judge.

[Endorsed]: Filed Apr. 12, 1943. [37]

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS AND
OF GENUINENESS OF DOCUMENTS,
PURSUANT TO RULE 36 OF THE RULES
OF CIVIL PROCEDURE, AND OF INTER-
ROGATORIES PROPOUNDED TO THE
DEFENDANT PETER BER CUT, PUR-
SUANT TO RULE 33 OF THE RULES OF
CIVIL PROCEDURE, WITH RESPECT TO
SAID DOCUMENTS.

To the defendant Peter Bercut and to Louis
Brownstone, Esq., his attorney:

The above named plaintiff does hereby request,
pursuant to Rule 36 of the Rules of Civil Procedure,
that the defendant, Peter Bercut admit (1) that
the original document, copy of which is attached as
plaintiff's exhibit "4" to the deposition of L. R.
Arnold (said document purporting to be the resig-
nation of Peter [38] Bercut as an officer and direc-
tor of Pacific Empire Holdings, Incorporated) was
executed by him, signed by him and delivered by
him to L. R. Arnold.

(2) Plaintiff requests of the said defendant, pur-
suant to Rule 33 of the Rules of Civil Procedure,
that he answer separately and fully in writing, un-
der oath, within fifteen days from date of this re-
quest, the following interrogatories:

(a) State whether or not the document, a copy
of which is attached to the deposition of L. R.
Arnold as plaintiff's Exhibit No. "4" and which
document purports to be your resignation as an

officer and director of Pacific Empire Holdings, Incorporated, was signed by you on the date it purports to bear, namely: March 31, 1940.

(b) If your answer to the foregoing question is in the negative please state on what date the said document was signed by you.

(c) To whom, when and where did you deliver the said document?

(d) State as fully as possible the time, place and circumstances under which the said document was prepared, signed and delivered by you.

(e) Did you sign and deliver any document of a substantially similar nature or character to Pacific Empire Corporation? If so, when and where and to whom delivered and the circumstances under which the same was delivered?

(f) When did you first become a director of Pacific Empire Holdings, Incorporated?

(g) When did you first become an officer of Pacific Empire Holdings, Incorporated and what office did you hold therein?

(h) When did you cease being a director of Pacific Empire Holdings, Incorporated? [39]

(i) When did you cease being an officer of Pacific Empire Holdings, Incorporated?

(j) State with whom you conducted the negotiations with respect to the purported purchase by you of the capital stock of Merchants Ice & Cold Storage Company owned by Pacific Empire Holdings, Incorporated, referred to in that certain letter agreement between Pacific Empire Holdings, Incorporated,

porated and Peter Bercut dated January 8, 1941, a copy of which is attached as plaintiff's Exhibit "3" to the deposition of L. R. Arnold.

(k) Have you, in your possession the original document, a copy of which is attached to the deposition of L. R. Arnold as plaintiff's Exhibit "3" and which purports to be the letter agreement between Pacific Empire Holdings, Incorporated and Peter Bercut dated January 8, 1941?

(l) Did you obtain any other document or evidence of sale of the shares of stock referred to in said letter agreement dated January 8, 1941 from Pacific Empire Holdings, Incorporated?

(m) If you have the original document of said letter agreement dated January 8, 1941, please deliver a photostatic copy thereof to plaintiff.

(n) Please name the officers and directors of Pacific Empire Holdings, Incorporated, with whom you discussed the purported purchase by you from Pacific Empire Holdings, Incorporated, of the said shares of stock referred to in said letter agreement dated January 8, 1941.

(o) If you have the original of the said letter agreement dated January 8, 1941 does the said original document bear the seal of Pacific Empire Holdings, Incorporated thereon, and state by whom the said agreement was executed.

(p) If the said letter of resignation, dated March 31, 1940, a copy of which appears as plaintiff's Exhibit "4" to the deposition of L. R. Arnold, was not signed and delivered by you please state whether

you ever did deliver any letter of resignation [40] as an officer and director of Pacific Empire Holdings, Incorporated, to any of the officers of Pacific Empire Holdings, Incorporated, and if you have a copy of such letter of resignation please deliver a copy thereof to plaintiff and state to whom you delivered such letter of resignation. When, where and under what circumstances was the same delivered?

Dated: February 5th, 1943.

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

CONRAD T. HUBNER

Attorneys for Plaintiff

Receipt of Service.

[Endorsed]: Filed April 17, 1943. [41]

[Title of District Court and Cause.]

REPLY TO REQUEST FOR ADMISSION OF
FACTS AND OF GENUINENESS OF
DOCUMENTS, PURSUANT TO RULE 36
OF THE RULES OF CIVIL PROCEDURE,
AND OF INTERROGATORIES PRO-
POUNDED TO THE DEFENDANT PETER
BERCUT, PURSUANT TO RULE 33 OF
THE RULES OF CIVIL PROCEDURE,
WITH RESPECT TO SAID DOCUMENTS.

Now comes the defendant, Peter Bercut, and re-
plying to the request for admission of facts and of

genuineness of documents, pursuant to Rule 36 of the Rules of Civil Procedure, and of interrogatories propounded to the defendant, Peter Bercut, pursuant to Rule 33 of the Rules of Civil Procedure, with respect to said documents, and alleges as follows:

1. Defendant admits that the original document, copy of [42] which is attached as plaintiff's exhibit 4 to the deposition of L. R. Arnold, was signed by him and delivered by him to L. R. Arnold.

2. Answering the requests of defendant for answers to interrogatories:

- (a) The document attached to the deposition of L. R. Arnold as plaintiff's exhibit 4, was not signed by this defendant on the date that it purports to bear, namely, March 31, 1940.

- (b) To the best of this answering defendant's knowledge, the document was signed on or about January 8, 1941.

- (c) The document referred to was delivered to L. R. Arnold at the office of Pacific Empire Holdings, Inc., 26 O'Farrell Street, San Francisco, California on the date that it was signed.

- (d) The document was signed and delivered at the time and place just hereinabove in paragraph 2(c) stated, after being produced by L. R. Arnold, and was signed by this answering defendant at the request of L. R. Arnold.

- (e) Answering paragraph 2(e) of the interrogatories no document of a substantially similar nature

or character was signed or delivered to Pacific Empire Corporation.

(f) This answering defendant first became a director of Pacific Empire Holdings, Inc. on or about February 15, 1933.

(g) This answering defendant first became an officer of Pacific Empire Holdings, Inc. on March 28, 1933, as Vice-President.

(h) This answering defendant ceased being a director of Pacific Empire Holdings, Inc. on or about March 31, 1940.

(i) This answering defendant ceased being an officer of Pacific Empire Holdings, Inc. on or about March 31, 1940.

(j) Negotiations with respect to the purchase by this answering defendant of the capital stock of Merchants Ice & Cold [43] Storage Company owned by Pacific Empire Holdings, Inc., referred to in that certain letter agreement between Pacific Empire Holdings, Inc. and Peter Bercut dated January 8, 1941, were conducted with L. R. Arnold and M. Maffei representing Pacific Empire Holdings, Inc.

(k) Defendant has in his possession the original document referred to in the previous paragraph of this answer to interrogatories.

(l) No other documents evidencing the sale of the shares of stock referred to in said letter agreement, other than the shares themselves, a proxy to vote Merchants Ice & Cold Storage Company shares executed by Pacific Empire Holdings, Inc. and dated January 8, 1941, and letters referring to the said

sale, all of said letters bearing a date subsequent to January 8, 1941, were obtained by this answering defendant.

(m) Answering paragraph 2(n) of said interrogatories, the purchase by this answering defendant of the shares of stock referred to in said letter agreement dated January 8, 1941 was discussed by this answering defendant with M. Maffei, President and director, and L. Arnold, Secretary and director of Pacific Empire Holdings, Inc.

(n) The original of said letter agreement dated January 8, 1941 bears the seal of Pacific Empire Holdings, Inc. and was executed for and on behalf of said corporation by M. Maffei, President and L. R. Arnold, Secretary of said corporation.

(o) Answering paragraph 2(p) of said interrogatories, the letter of resignation dated March 31, 1940 therein referred to was signed and delivered by this answering defendant.

PETER BER CUT

Subscribed and sworn to before me this 17th day of February, 1943.

[Seal]

LOUIS WIENER

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Feb. 23, 1943. [44]

[Title of District Court and Cause.]

STIPULATION PERMITTING USE
OF DEPOSITIONS

Whereas, in that certain action entitled "Thomas H. Wingate, as Receiver in Equity for Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, and Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, Plaintiffs, vs. Peter Bercut, Ernest E. Bercut, Henri Bercut, Jean Bercut, et al," being action No. 312,800, in the Superior Court of the State of California, in and for the City and County of San Francisco, which action has now been dismissed without prejudice, certain depositions were taken on behalf of plaintiff, to-wit: the depositions of L. R. Arnold, Leona Keener and A. A. Heer, Jr.; and

Whereas, a deposition of A. A. Heer, Jr. was taken in that certain action entitled "Pacific Empire Corporation vs. Peter Bercut, et al," being action No. 313,269, in the office of the Clerk of said court; and [45]

Whereas, the above named plaintiff now desires to take the depositions of L. R. Arnold, Leona Keener and A. A. Heer, Jr., for use on behalf of plaintiff in the above entitled action;

Now, Therefore, in lieu of again taking said depositions it is hereby stipulated by and between the undersigned that the said depositions of L. R. Arnold, A. A. Heer, Jr., and Leona Keener may be used by either of the parties to this action at the

trial of the above entitled action, subject to all of the exceptions, objections and reservations made during the taking of said depositions and as in said depositions expressed.

Dated: San Francisco, California, October 27, 1942.

A. J. SCAMPINI
ELLIS & STEINDORF
CONRAD T. HUBNER
L. F. MAHAN

Attorneys for Plaintiff
Thomas H. Wingate, as
Receiver in Equity for
Pacific Empire Hold-
ings, Inc., a Delaware
corporation.

LOUIS E. GOODMAN &
LOUIS H. BROWNSTONE
GOODMAN & BROWNSTONE

Attorneys for Defendants Peter Bercut, Ernest
E. Bercut, Henry Bercut and Jean Bercut.

J. A. PARDINI

Attorney for Defendants M. Maffei and L. R.
Arnold.

[Endorsed]: Filed Dec. 31, 1942. [46]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Tuesday, April 20, 1943

Counsel Appearing:

For Plaintiff: A. J. Scampini, Esq., Ivan Culbertson, Esq., L. F. Mahan, Esq., Ellis & Steindorf, C. T. Hubner, Esq.

For Defendants: Louis H. Brownstone, Esq., George M. Naus, Esq., J. A. Pardini, Esq.

Mr. Scampini: At this time if your Honor please I wish to offer in evidence an exemplified copy of order of appointment of receiver.

The Court: It may be admitted and marked.

(Copy of order is marked "Plaintiff's Exhibit 1.")

PLAINTIFF'S EXHIBIT 1

In the Court of Chancery of the State of Delaware
in and for New Castle County

REBECCA TANZER and ELIZABETH
WILHELM,

Complainants,

vs.

PACIFIC EMPIRE HOLDINGS, INCORPORATED, a corporation of the State of Delaware,

Defendant.

BILL FOR RECEIVER

And now, to-wit, this 31st day of August, A. D. 1942, the Bill of Complaint in the above entitled

cause, with the Answer of the defendant admitting the allegations of said Bill and consenting to the granting of the relief prayed for, being duly presented, and it appearing therefrom that the defendant is a corporation organized and existing under the laws of the State of Delaware, that complainant is a creditor and stockholder thereof, that the defendant is insolvent in the equity sense, in that it is unable to pay its obligations as they mature in due course of business, that defendant is not a corporation for public improvement, and that the appointment of a Receiver or Receivers of said defendant by this Court would be for the benefit of its creditors and stockholders,

It is ordered, adjudged and decreed by the Chancellor that Thomas H. Wingate, of the City of Wilmington, State of Delaware, be and he is hereby appointed Receiver of Pacific Empire Holdings, Incorporated, the defendant herein, to take charge of the estate, effects, business and affairs thereof, to collect the outstanding debts, claims and property due and belonging to the said defendant, with power to prosecute and defend in the name of said defendant, or otherwise, all claims and suits; to appoint an agent or agents under said Receiver, and, subject to the approval of the Chancellor, to do all other acts which might be done by said corporation that may be necessary and proper; and with power to compromise, adjust, and settle claims which the defendant has against any person, firm, or corpora-

tion, or which may be due to the defendant by any person, firm, or corporation;

And it is further ordered that said defendant, its President, directors, officers, agents, servants, and attorneys be and they are each of them hereby restrained and expressly enjoined, until further order of the Chancellor, from receiving, collecting or compromising any debts due or belonging to defendant and from paying out, selling, assigning or transferring any property, estate, moneys, funds, lands, tenements or effects of any description whatsoever belonging to said defendant to any person other than the Receiver hereby appointed;

And it is further ordered that said defendant, its President, directors, officers, agents, servants and attorneys, shall forthwith deliver to said Receiver the property and effects thereof and all books, records and papers touching the same and pertaining to its business and affairs in its or their possession or custody;

And it is further ordered, that pursuant to paragraph 2075 Section 43, of the Revised Code of the State of Delaware of 1935, said Receiver shall be and hereby is vested by operation of law, without any act or deed, with the title of said defendant to all its books, papers and documents, interests in patents, patent rights, copyrights and trademarks, rights of action arising upon contracts or from the unlawful taking or detention of or injury to property of said defendant; and other property, real, personal or mixed, of whatsoever nature, kind,

class or description, and wheresoever situate, except real estate situate outside of the State of Delaware;

And it is further ordered that said Receiver, within five days from this date, shall give bond in the usual form in the sum of Two Thousand (\$2000.00) Dollars, with surety approved by the Chancellor, conditioned for the faithful performance of his duties as such Receiver, and National Surety Company, a corporation of the State of New York, is hereby approved as surety on said bond;

And it is further ordered that the Chancellor reserves the right to make such further order or orders, decree or decrees herein as to him shall seem proper.

/s/ WM. WATSON HARRINGTON
Chancellor.

State of Delaware,
New Castle County—ss.

I, Anthony F. Emory, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of Order signed by the Chancellor August 31, A. D. 1942, appointing Thomas H. Wingate, Receiver of Pacific Empire Holdings, Incorporated, said receiver having duly filed the requisite bond, and said appointment being in full force *an* effect, as the same remains on file and of record in said Court.

In Testimony Whereof, I have hereunto, set my hand and affixed the seal of said Court, at Wilmington, this 16th day of April in the year of our Lord, nineteen hundred and Forty-Three.

[Seal]

ANTHONY F. EMORY

Register in Chancery.

State of Delaware, to wit:

I, William Watson Harrington, Chancellor of the State of Delaware, do hereby certify that the foregoing Record and Attestation, made by Anthony F. Emory, Esquire, Register in Chancery within the County of New Castle, whose name is thereto subscribed, and to which the seal of said Court is affixed, are in due form of law, and made by the proper officer.

In Testimony Whereof, I have hereunto set my hand, this 16th day of April in the year of our Lord, nineteen hundred and Forty-Three.

WM. WATSON HARRINGTON

Chancellor.

State of Delaware,
New Castle County—ss.

I, Anthony F. Emory, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the Honorable William Watson Harrington, by whom the foregoing attestation was made and whose name is thereto subscribed, was at the time of the making thereof, and still is Chancellor of the State of Delaware, duly commissioned and sworn, to all

whose acts, as such full faith and credit are and ought to be given, as well in Courts of Justice as elsewhere.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at Wilmington, this 16th day of April in the year of our Lord, nineteen hundred and Forty-Three.

[Seal]

ANTHONY F. EMORY

Register in Chancery.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Plfs. Ex. No. One. Filed 4-20-43. Walter B. Maling, Clerk. J. P. Welsh, Deputy Clerk.

MICHAEL MAFFEI,

called as a witness for Plaintiff; sworn.

Mr. Scampini: Q. Mr. Maffei, will you give your full name? A. Michael Maffei.

Q. What is your business or occupation or activity at the present time?

A. I am in the macaroni business.

Q. What company are you associated with?

A. The Italian American Pastry Company.

Q. What position do you hold there?

A. President. [49]

Q. Prior to becoming president of the Italian American Pastry Company were you connected with the Pacific Empire Holdings, Incorporated?

A. Yes.

Q. Until on or about when, Mr. Maffei?

A. I think about between six and eight months ago.

(Testimony of Michael Maffei.)

Q. Upon the appointment of the receiver, is that correct? A. Yes.

Q. What was your position in the company?

A. President.

Q. Pacific Empire Holdings, Incorporated, was a Delaware corporation? A. It was.

Q. Organized under the laws of the State of Delaware? A. That is right.

Q. And when was it created or organized, as far as you know? A. I think in the year 1930.

Q. Will you state briefly the origin of this corporation?

A. Originally it was Calitalo Investment Corporation, a California corporation.

Q. Was there an old corporation known as the Brotherhood Investment Company?

A. Brotherhood Investment Company, and it was reorganized and made the Calitalo Investment Company.

Q. If I understand you correctly, the Calitalo Investment Corporation was organized for the purpose of taking over the Brotherhood Investment Company?

A. The Calitalo Investment Company was organized for the purpose of taking over the assets of the Brotherhood Investment Company and the Associated Calitalo Investment Company for the purpose of taking over the Calitalo.

Q. Now, The Associated Calitalo Holdings Inc. was of course a Delaware corporation?

A. Yes.

(Testimony of Michael Maffei.)

Q. Did that company on or about the year 1934 change its cor- [50] porate name? A. It did.

Q. To what?

A. Pacific Empire Holdings, Incorporated.

Q. When did you first become connected with the Pacific Empire Holdings, Inc., or its predecessor? A. Well, about 1929.

Q. In what capacity?

A. As president of the Calitalo Investment Company.

Q. How long did you continue to be president of the Calitalo Investment Corporation, or its successor in interest, the Pacific Empire Holdings, Incorporated?

A. I think it was about until 1930 or 1931, and then we incorporated the Associated Calitalo Investment Company.

Q. You became the president of the new corporation? A. That is it.

Q. And you continued to be the president right down to the present time, isn't that right?

A. I did.

Q. How many stockholders, approximately, did Pacific Empire Holdings, Incorporated, have, to your knowledge?

A. I don't know exactly, around nine or ten thousand.

Q. Will you state briefly what the activities of the Brotherhood Investment Company and its suc-

(Testimony of Michael Maffei.)

cessor in interest, the Associated Calitalo Holdings, Inc. were during the years, say, 1931, 1932?

A. It was an investment company, an investment holding company.

Q. Among its assets, what did it own?

A. Well, we had a bank in Portland, a bank in Seattle, one in Rio Vista, one in San Francisco, one at Courtland, one at Tenino, Washington.

Q. The bank in San Francisco, which you referred to, what was its name?

A. The City National Bank of San Francisco.

Q. How many shares, approximately, did the company of which *you president* own in this bank?

A. I don't remember.

Q. I mean what proportion?

A. We had about 51 per cent. [51]

Q. Was William A. Sherman president of the City National Bank of San Francisco?

A. That is right.

Q. And you were the president of the holding company? A. Yes.

Q. In addition to those assets of the companies or banks which you have described, did the Associated Calitalo Holdings, Incorporated, own any other assets that you can recall?

A. Well, they had an insurance agency in Los Angeles, and they had some interest in the Merchants Ice & Cold Storage Company.

Q. What year are you referring to?

A. Back in 1932 or 1933, something like that.

(Testimony of Michael Maffei.)

Q. Did it have any notes or obligations of the Brotherhood of Locomotive Engineers?

A. Yes, it had notes in the amount of \$470,000.

Q. 6 per cent notes?

A. 6 per cent notes.

Q. Do you recall when Peter Bercut became associated with or connected in an official capacity with the Pacific Empire Holdings, Incorporated, or its predecessor company?

A. Mr. Bercut became a director, I think, at the same time I became president.

Q. Do you recall when Mr. Peter Bercut became connected with the Pacific Empire Holdings, Incorporated?

A. Well, I think when Pacific Empire Holdings, Incorporated was formed.

Q. When was it formed?

A. I don't recall exactly.

Q. In 1933, or thereabouts?

A. At the time the corporation was formed he was a director.

Q. Can you state, generally, the purpose of forming the Pacific Empire Corporation?

A. That was formed for the sole purpose of taking over the assets of the City National Bank.

Q. Which bank had been liquidated at that time? A. That is right.

Q. Had the City National Bank been sold or merged with the Pacific National Bank at that time?

(Testimony of Michael Maffei.)

A. They were merged for so [52] many shares in the Pacific National Bank.

Q. So that the City National Bank of San Francisco acquired a block of shares in the Pacific National Bank as a result of this merger?

A. Yes.

Q. Can you state approximately how many shares there was acquired by the City National Bank in the Pacific National Bank?

A. I think it originally was fifteen hundred and some shares.

Q. The purpose, you said, for the organization of the Pacific Empire Corporation was to take over all of the assets of the City National Bank of San Francisco which was then in the course of liquidation?

A. That is right.

Q. Can you state who was liquidating agent of the City National Bank of San Francisco?

A. Mr. L. R. Arnold.

Q. Was Mr. Arnold connected with the Pacific Empire Holding Company?

A. Yes.

Q. What was his position?

A. He was secretary and treasurer.

Q. Was he a director?

A. A director.

Q. Did you have any executive committee in Pacific Empire Holding Company?

A. Yes, I and Mr. Bercut and Mr. Arnold.

Q. Mr. Arnold acted as liquidating agent for City National Bank of San Francisco?

A. Yes.

(Testimony of Michael Maffei.)

Q. How many shares did the Pacific Empire Holding, Inc. acquire in Pacific Empire Corporation?

A. They had about 52 per cent. of the stock.

Q. What did the Pacific Empire Corporation acquire as a result of the transaction?

A. So many shares of stock in the Pacific Empire Holdings, Incorporated, and some notes.

Q. All of the assets in the possession of the liquidating agent?

A. That is right.

Q. Which included this block of stock in the City National Bank [53] from the Pacific National Bank?

A. Yes.

Q. Who were the directors of the Pacific Empire Corporation, if you recall?

A. Myself, Mr. Bercut, Mr. Stratton, Mr. Vincent.

Q. You said, if I recall correctly, that sometime in the year 1931 Pacific Empire Holdings, Incorporated, or its predecessor, had a small interest in Merchants Ice & Cold Storage Company.

A. That is right.

Q. Did it thereafter acquire a substantial interest in Merchants Ice & Cold Storage Company?

Mr. Naus: You say it had a small interest in 1931. He said that was in 1932 or 1933.

Mr. Scampini: Q. When did the Pacific Empire Holdings, Incorporated first acquire any interest in the Merchants Ice & Cold Storage Company?

A. Well, right around 1930 or 1931 they had a

(Testimony of Michael Maffei.)

few shares, but the big interest was when they took over the McInerney stock and the Sherman stock, and Vincent and Stratton.

Q. When did that transaction take place?

A. The minute book will show the whole transaction.

Q. Do you recall approximately for what price the block of shares was acquired from the parties whom you have named of the Merchants Ice & Cold Storage Company?

A. Well, about \$250,000.

Q. As the result of the acquisition of this block of shares by the holding company from those individuals whom you have named was voting control acquired of the Merchants Ice & Cold Storage Company? A. Yes.

Q. Who at that time was the president of the Merchants Ice & Cold Storage Company, when the voting control or the major ownership, as it were, was acquired? A. William A. Sherman.

Q. He had been president of the City National Bank of San Francisco? [54]

A. That is correct.

Q. From there he went to the Calitalo?

A. He was president.

Q. He was president? A. Yes.

Q. William A. Sherman is now dead?

A. He is dead.

Q. Was Mr. Bercut a director of the Pacific Empire Holdings, Incorporated at the time that

(Testimony of Michael Maffei.)

this block of stock was acquired from these individuals? A. He was.

Q. Did the holding company thereafter, after the acquisition of this block of stock, acquire any further shares of Merchants Ice & Cold Storage Company? A. They did.

Q. From time to time?

A. From time to time.

Q. And on January 8, 1941, or thereabouts, will you state whether or not the holding company owned 65,863 shares of the common stock and 12,495 shares of the preferred stock of the Merchants Ice & Cold Storage Company? A. In what year?

Q. January 8, 1941.

A. In that neighborhood, yes.

Q. And all of the stock originated in the manner in which you have testified?

A. That is right.

Q. Can you state whether or not, on or about January 8, 1941, the aggregate cost of these two blocks of shares—can you state what was the aggregate cost, approximately?

A. I could not give the aggregate cost without looking at the books.

Q. Are the costs set forth in the books, to your knowledge? A. That is right.

Q. Now, when did Mr. Arnold first become connected with the Pacific Empire Holdings, Inc., or its predecessor?

(Testimony of Michael Maffei.)

A. I think it was in the neighborhood of either 1931 or 1932.

Q. From what position did he come, or where did he come from?

A. Well, he came from, I think, back East, or the East Coast, as auditor of the bank. [55]

Q. Which bank?

A. All of them, he was accountant for the banks.

Q. You mean for the holding company?

A. That is right.

Q. When did he first become a member of the executive committee, if you recall?

A. That I could not recall.

Q. Who actually managed the affairs and business of the Pacific Empire Holdings, Inc.?

A. Myself and Mr. Arnold, both.

Q. You had a board of directors consisting of how many members? A. Six or seven.

Mr. Scampini: In the interest of time, will it be stipulated that these minute books may be introduced in evidence?

Mr. Naus: Let them be marked for identification and state for the record the portion of them which are considered to be relevant, otherwise these books contain a great deal of immaterial evidence.

Mr. Scampini: I think the books should go in evidence and then each side will be entitled to read into the record the portion which he wishes.

Mr. Naus: I object to the offer of this mass of books in evidence as a whole on the ground that

(Testimony of Michael Maffei.)

they contain a great deal of immaterial evidence. I will make no objection to the books being marked for identification as distinguished from being put in evidence, and then thereafter I will make no objection to the relevant portions that are desired to go into evidence.

The Court: The books may be marked for identification.

Mr. Scampini: It is stipulated that they are the minute books of the corporation, is that right, Mr. Brownstone?

Mr. Brownstone: So stipulated.

(The minute books were marked Plaintiff's Exhibits 2, 3, 4, 5, and 6 for Identification.)

Mr. Scampini: Now, at this time, may it please the Court, I [56] desire to offer in evidence as Plaintiff's Exhibit next in order the articles of incorporation and the by-laws of this company which are found in Volume 1 of the Minute Book, page 1, going to page 44, followed by unnumbered pages entitled, "Certificate of Amendment of Certificate of Incorporation of Associated Calitalo Holdings, Limited, Incorporated," wherein the name was changed to Pacific Empire Holdings, Incorporated. I offer the articles and the by-laws and the amendment. I have here a typewritten copy of these articles and by-laws which was prepared at the time the depositions were taken, of which you have a copy, and I will ask that this be marked as our exhibit next in order. This is a correct copy.

(Testimony of Michael Maffei.)

The Court: Subject to such corrections as may be made. Let it be marked.

(The documents referred to were marked "Plaintiff's Exhibit 7.")

PLAINTIFF'S EXHIBIT No. 7

CERTIFICATE OF INCORPORATION OF ASSOCIATED CALITALO HOLDINGS, LTD., INCORPORATED.

First: That the name of said corporation shall be Associated Calitalo Holdings, Ltd., Incorporated.

Second: Its principal office in the State of Delaware is located at No. 7 West Tenth Street, in the City of Wilmington, County of New Castle. The name and address of its resident agent is the Corporation Trust Company of America, No. 7 West Tenth Street, Wilmington, Delaware.

Third: That the purposes for which said corporation is formed are:

To carry on and transact, in the State of Delaware, the District of Columbia, all other states, territories and colonies of the United States, and in (1*) any and all foreign countries, the following business:

(a) To act as agents for insurance companies, in soliciting and receiving applications for—fire; casualty; plate-glass, boiler, elevator; accident; health, liability; burglary; rent, marine; credit and life

*Page numbering appearing at foot of page of original certificate of incorporation.

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

insurance and all other kinds of insurance; the collecting of premiums and doing such other business as may be delegated to agents and brokers by such companies, and to conduct a general insurance agency and insurance brokerage business.

(b) To act as financial, commercial or general agent or representative of any corporation, association, company, firm, syndicate, individual or others and as such to develop, improve and extend the property, trade and business interests thereof, and to aid in any lawful enterprises in connection with acting as such agent or broker for any principal to give any other aid or assistance; and to act as such agent, representative or broker for any such corporation, association, company, firm, syndicate or individual on commission or salary, or for other lawful consideration, or without consideration for other lawful purpose. (2)

(c) To undertake and carry on any business, undertaking, enterprise, venture, transaction or operation commonly undertaken or carried on by promoters, contractors, merchants, commission men and agents; and in the course thereof to acquire and dispose of, or otherwise turn to account, or realize upon, all or any negotiable or transferable interests and securities, including debentures, bonds, notes, certificates of indebtedness, certificates of interest, and all kinds of commercial paper.

(d) To purchase, or otherwise acquire, become

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

interested in, hold, sell, mortgage, pledge, hypothecate, or otherwise dispose of, or turn to account, or realize upon, all forms of securities including stocks, bonds, debentures, notes, evidences of indebtedness, certificates of indebtedness, certificates of interest, commercial paper, mortgages, and other similar instruments and rights issued or created by corporations, domestic or foreign, associations, companies, firms, trustees, syndicates, individuals, governments, states, municipalities, or other political divisions, issued or created by others, and to deal in and with the same, and to issue in exchange therefor, or in payment thereof, (3) its own stocks, bonds, or other obligations or securities, or otherwise pay therefor; to exercise in respect thereto any and all rights, powers and privileges of individual ownership, or interest therein, including the right to vote thereon and to consent, or otherwise act with respect thereto; to do any and all acts and things for the preservation, protection, improvement and enhancement in value thereof; or in any way design to accomplish any of such results, and to aid by loan, subsidy, guaranty or in any other manner, those issuing, creating or responsible for any of such securities; all to such extent as a corporation organized under the laws of the State of Delaware may then lawfully do.

(e) To acquire or become interested in any such securities as aforesaid by original subscription, un-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

derwriting, participation in syndicates or otherwise, and irrespective of whether or not such securities be fully paid, or subject to further payments; make payments thereon as called for, or in advance of calls, or otherwise, to underwrite or subscribe for the same, additional or otherwise, and either with a view to investment or for resale, or for any other lawful purpose. (4)

(f) To investigate and report with respect to, and to undertake, carry on, aid, assist or participate in the liquidation or reorganization of financial, commercial, mercantile, manufacturing, industrial, or other business concerns, firms, companies, associations and corporations; and for that purpose to take over the properties, manage the affairs and conduct the business of such concerns, firms, companies, individuals, associations, and corporations; and in the course of such business to acquire and dispose of, or otherwise turn to account all or any negotiable or transferable instruments or securities, including debentures, bonds, notes, certificates of indebtedness, certificates of interest, and all kinds of commercial paper.

(g) To purchase, or otherwise acquire, sell, or otherwise dispose of, realize upon, or otherwise turn to account, manage, liquidate, or reorganize, the properties, assets, business, undertakings, enterprises, or ventures, or any part thereof, of corporations, associations, companies, firms, individuals,

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

syndicates and others, to further and promote the general business interests of any thereof; and to improve, extend and place upon a safe and more (5) permanent foundation, any such business, undertaking, enterprise or venture.

(h) To promote and assist, financially or otherwise, corporations, firms, syndicates, associations, companies, individuals, and others; and to give any guaranty in connection therewith, or otherwise, for the payment of money or performance of any other undertaking or obligation.

(i) To institute, enter into, assist, promote, or participate in commercial, mercantile, industrial works, contracts, undertakings, ventures, enterprises and operations; to endorse or underwrite stock securities or undertakings of any corporation, firm, company, association, individual, syndicate, or others.

(j) To borrow money and for moneys borrowed, or in payment for property acquired, or for any other objects or purposes of the corporation, or otherwise, in connection with the transaction of any part of its business, to execute and issue bonds, debentures, notes and other obligations secured or unsecured; and to mortgage, deed, convey, entrust, pledge or hypothecate any or all of its properties (6) or assets as security herefor; to make, accept, endorse, guarantee, execute and issue notes and other obligations; to mortgage, pledge, or hypothe-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

cate any stocks, bonds, or evidence of indebtedness, securities, or any other property held by it, or in which it may be interested; and to lend money with or without collateral, or other security.

(k) To guarantee the payment of dividends upon stocks, or the principal, of any or interest upon bonds, notes, or other evidences of indebtedness, or obligations, or the performance of the contracts or other undertakings of any corporation, association, company, firm, syndicate, individual, or others; and to such extent to enter into, make, perform and carry out contracts of every kind for any lawful purpose with any person, firm, syndicate, individual, company, association, corporation, or others.

(l) To manufacture, purchase, buy, sell, own, mortgage, pledge, assign, transfer or otherwise acquire or dispose of, to invest, trade, deal in and with, goods, wares and merchandise and real and personal property of every class and description.

(7)

(m) To acquire and pay for in cash, stock, or bonds, of this corporation, or otherwise, the goodwill, rights, assets and property, and to undertake or assume the whole or any part of the obligations or liabilities of any person, firm, syndicate, association, company, or corporation.

(n) To buy, sell, hold, use, assign, lease, grant licenses in respect of, mortgage, hypothecate, or otherwise acquire or dispose of letters patent of the

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

United States, or any foreign country, patent rights, licenses and privileges, inventions, improvements and processes, copyrights, trade-marks and trade names, relating to, or useful in connection with, any business of this corporation, or in which it may have any interest.

(o) To issue bonds, debentures, or obligations, of this corporation from time to time for any of the objects or purposes of the corporation, and to secure the same by mortgage, pledge, deed of trust, or otherwise.

(p) To purchase, hold, sell, pledge, hypothecate or otherwise acquire or dispose of the shares of its own capital stock; provided it shall (8) not use its funds or property for the purchase of its own shares of capital stock, when such use would cause impairment of its capital; and provided further that shares of its own capital stock belonging to it shall not be voted upon directly or indirectly.

(q) To have one or more offices, to carry on all or any of the operations and business; and without restrictions or limit as to amount, to purchase, or otherwise acquire, hold, own, mortgage, sell, convey, or otherwise dispose of real and personal property of every class and description in any of the states, districts, territories or colonies of the United States, and in any and all foreign countries, subject to the laws of such state, district, territory, colony or country.

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

(r) To lend money and to take security for the payment thereof, and in general to be, perform, and carry out all lawful business, acts and things as shall be necessary, proper or convenient for the purpose of expediting and carrying on, conducting, managing and controlling the business and purpose of this corporation. (9)

Fourth: That the time for which such corporation is to exist is unlimited and said corporation shall have perpetual existence.

Fifth: That the capital stock of said corporation shall consist of five million (5,000,000) shares without par value.

Sixth: This corporation shall commence business with one thousand dollars (\$1,000.00).

Seventh: The names and places of residence of each of the original incorporators are as follows:

Name	Residence
L. E. Gray.....	Wilmington, Delaware
H. H. Snow.....	Wilmington, Delaware
L. H. Herman.....	Wilmington, Delaware

Eighth: The private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever.

Ninth: That said corporation shall not be bound to offer to its shareholders or stockholders any priority or preemptive right to subscribe for or to purchase its shares as presently divided or as here-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

after divided by amendment hereto, or otherwise.

Tenth: Whenever a compromise or arrangement is proposed between this corporation and its creditors or any class of them and/or between this corporation and its stockholders or any class of them, any court of equitable jurisdiction within the State of Delaware may, on the application in a summary way of this corporation or of any creditor or stockholder thereof, or on the application of any receiver or receivers appointed for this corporation under the provisions of Section 3883 of the Revised Code of 1915 of said State, or on the application of trustees in dissolution or of any receiver or receivers appointed for this corporation under the provisions of Section 43 of this Chapter, order a meeting of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, to be summoned in such manner as the said Court directs. If a majority in number representing three-fourths in value of the creditors or class of creditors, and/or of the stockholders or class of stockholders of this corporation, as the case may be, agree to any compromise or arrangement and to any reorganization of this corporation as consequence of such compromise or arrangement, the said compromise or arrangement and the said organization (11) shall, if sanctioned by the Court to which the said application has been made, be binding on all the creditors or class of

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

creditors, and/or on all the stockholders or class of stockholders, of this corporation, as the case may be, and also on this corporation.

Eleventh: The number of directors of the corporation shall be fixed and may be altered from time to time as may be provided in the by-laws. In case of any increase in the number of directors, the additional directors may be elected by the directors or by the stockholders at an annual or special meeting, as shall be provided in the by-laws.

The directors from time to time may determine at what times and places the accounts and books of the company (other than the stock ledger), shall be open to the inspection of the stockholders; and no stockholder shall have any right to inspect any account or book or document of the company, unless expressly so authorized by statute or by a resolution of the stockholders or the directors.

The directors in their discretion may submit any contract or act for approval or ratification at any annual meeting of the stockholders or at any (12) meeting of the stockholders called for the purpose of considering any such act or contract, and any contract or act that shall be approved or be ratified by the vote of the holders of a majority of the capital stock of the company which is represented in person or by proxy at such meeting (provided that a lawful quorum of stockholders be there represented in person or by proxy) shall be as valid

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

and as binding upon the corporation and upon all the stockholders, as though it had been approved or ratified by every stockholder of the corporation, whether or not the contract or act would otherwise be open to legal attack because of directors' interest, or for any other reason.

The directors shall also have power without the assent or vote of the stockholders to make and alter by-laws of the corporation, to fix the times for the declaration and payment of dividends; to fix and vary the amount to be reserved as working capital; to authorize or cause to be executed mortgages and liens upon all the property of the corporation, or any part thereof.

The directors shall also have power, with the consent in writing of a majority of the holders (13) of the voting stock issued and outstanding, or upon the affirmative vote of the holders of a majority of the stock issued and outstanding having voting power, to sell, lease or exchange all of its property and assets, including its good-will and its corporate franchises, upon such terms and conditions as the board of directors deem expedient and for the best interests of the corporation; to determine the use and disposition of any surplus or net profits over and above the capital stock paid in, and in their discretion the directors may use and apply any such surplus or accumulated profits in purchasing or acquiring the bonds or other obligations or shares

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

of capital stock of the corporation, to such extent and in such manner and upon such terms as the directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold unless such shares shall have been retired for the purpose of decreasing the corporation's capital stock as provided by law.

In addition to the powers and authorities hereinbefore or by statute expressly conferred upon them, the directors are hereby empowered to exercise (14) all such powers and do all such acts and things as may be exercised or done by the corporation; subject, nevertheless, to the provisions of the statutes of Delaware, of this certificate, and to any by-laws from time to time made by the stockholders; provided, however, that no by-laws so made shall invalidate any prior act of the directors which would have been valid if such by-laws had not been made.

Both stockholders and directors shall have power, if the by-laws so provide, to hold their meetings, and to have one or more offices within or without the State of Delaware, and to keep the books of the corporation (subject to the provisions of the statutes), outside of the State of Delaware, at such places as may be from time to time designated by the board of directors.

Twelfth: In all elections, stockholders entitled to vote shall have and are hereby expressly granted the right to cumulate the votes and to vote all or

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

any part of the entire votes to which they are entitled for any one or more of the entire number of candidates. (15)

We, the undersigned, being each of the incorporators hereinbefore named for the purpose of forming a corporation to do business both within and without the State of Delaware, and in pursuance of the General Corporation Law of the State of Delaware, being Chapter 65 of the Revised Code of Delaware, and the acts amendatory thereof and supplemental thereto, do make this certificate, hereby declaring and certifying that the facts herein stated are true, and accordingly have hereunto set our hands and seals this 6th day of January, A. D. 1930.

L. E. GRAY (Seal)

H. H. SNOW (Seal)

L. H. HERMAN (Seal)

In presence of:

ALBERT L. MILLER (16)

State of Delaware,
County of New Castle—ss.

Be it remembered, that on this 6th day of January, A. D. 1930, personally came before me, Albert L. Miller, a Notary Public for the State of Delaware, L. E. Gray, H. H. Snow and L. H. Herman all of the parties to the foregoing Certificate of Incorporation, known to me personally to be such,

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

and severally acknowledged the said certificate to be the act and deed of the signers respectively and that the facts therein stated are truly set forth.

Given under my hand and seal of office the day and year aforesaid.

ALBERT L. MILLER

Notary Public

(Albert L. Miller, Notary Public. Appointed Aug. 31, 1929. Term 2 years. Delaware.) (17)

STATE OF DELAWARE

OFFICE OF SECRETARY OF STATE

I, Charles H. Grantland, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Incorporation of the "Associated Cal-italo Holdings, Ltd., Incorporated", as received and filed in this office the seventh day of January, A. D. 1930, at 9 o'clock A. M.

In Testimony Whereof, I have hereunto set my hand and official seal, at Dover, this seventh day of January in the year of our Lord one thousand nine hundred and thirty.

CHARLES H. GRANTLAND

Secretary of State

(Secretary's Office. 1911. 1855 Delaware 1793)

(18)

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

RECEIVED FOR RECORD
JANUARY 7TH, A. D. 1930
ALBERT STETSER, RECORDER

State of Delaware,
New Castle County—ss.

Recorded in the Recorder's Office at Wilmington,
in Certificate of Incorporation, Record Q, Vol. 34,
Page 133 &c., the 7th day of January, A. D. 1930.

Witness my hand and official seal.

ALBERT STETSER
Recorder

(Recorder's Office, New Castle Co., Del. Mercy—
Justice) (19)

AMENDMENTS TO ARTICLES OF
INCORPORATION
of
ASSOCIATED CALITALO HOLDINGS, LTD.
INCORPORATED

Article Fifth

February 26th, 1932

March 21st, 1932

"That the total number of shares of stock which
said corporation shall have authority to issue is
five million (5,000,000) shares of capital stock, all
having a par value of ten cents (10¢) per share."

(20)

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

BY-LAWS
of
ASSOCIATED CALITALO HOLDINGS, LTD.,
INCORPORATED

ARTICLE I—CORPORATE NAME

The name of the corporation for whom the following by-laws are hereinafter certified and adopted is as prescribed in the articles of incorporation thereof: Associated Calitalo Holdings, Ltd., Incorporated.

ARTICLE II—CORPORATE SEAL

The company shall have a corporate seal consisting of a circle having on its circumference the words, "Associated Calitalo Holdings, Ltd., Incorporated," the year of its organization, and the words, "Corporate Seal Delaware."

ARTICLE III—CORPORATE POWERS

The corporate powers of this corporation shall be such as are prescribed by the articles of incorporation hereof. (21)

ARTICLE IV—DIRECTORS

Section 1—Election

The directors shall not be less than fifteen (15) nor more than twenty-five (25) in number and shall be elected by ballot at the annual meeting of the stockholders.

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

Section 2—Term of Office

Directors shall hold office for one year and until their successors are elected or appointed. Their term of office shall begin immediately after election.

Section 3—Qualifications

Every director must be the owner of stock of this corporation standing in his own name on the books of the corporation.

Section 4—Vacancies

A vacancy shall be deemed to exist in the board of directors only whenever any director ceases to act as such by reason of his death, removal, or resignation duly accepted, or when any director is (22) adjudicated an incompetent person or *in* insane person, or ceases to be the owner of any stock in this corporation, or in case the shareholders shall increase the authorized number of directors and shall fail for a period of thirty (30) days from the effective date of such increase to elect the additional directors so provided for, or in case the shareholders fail at any time to elect the full number of authorized directors.

Section 5—Resignation

No resignation of a director shall take effect so long as such resignation would reduce the number of directors to a number less than necessary to form a quorum of said board unless the remaining members of said board shall have first accepted the res-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

ignation of a director proposing to resign under such circumstances.

Section 6—Appointment

Vacancies in the board of directors shall be filled by an appointee of the board who shall hold office until his successor is elected at the next annual meeting of the shareholders, or at any special meeting duly called for that purpose prior thereto. (23)

Section 7—Compensation

The compensation of each director for attendance at directors' meetings shall be fixed by the stockholders.

ARTICLE IV—POWERS OF DIRECTORS

Section 1—General Management

The board of directors shall have vested in it all the corporate powers of this corporation with the right to conduct, manage and control the business of the corporation and to make for it rules and regulations not inconsistent with the laws of the State of Delaware or the by-laws of the corporation for the guidance of the officers and management of the affairs of the corporation. The board of directors shall have full power and authority to do and perform and cause to be done and performed any and every act which the corporation may lawfully do and perform, including the matters hereinafter set forth in this article.

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

Section 2—Delegation of Management

The directors shall have the power to elect (24) or choose all officers and agents, attorneys in fact, servants and employees of the corporation and may remove any of them except a director and prescribe such duties for each of them as are not inconsistent with the laws or these by-laws, and fix their compensation and require from them security for faithful performance, if deemed necessary. The directors shall also have the power to appoint an executive committee to transact the business of the corporation as hereinafter set forth.

Section 3—Vacancies

The board of directors, as at any time constituted, shall have the power to appoint persons to act as directors for the purpose of filling any vacancy created in said board.

Section 4—Incurrance of Debt

The board of directors shall have full power and authority to borrow money on behalf of the company, including the power and authority to borrow money from any of the shareholders, directors or officers of the company and otherwise to incur indebtedness on behalf of the company; to authorize (25) the execution of promissory notes or other evidences of indebtedness of the company and to agree to pay interest thereon; to sell, convey, alienate, transfer, assign, exchange, pledge, hypothecate

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

or otherwise encumber the property, real and personal, and the franchises of the company to purchase, sell, lease and otherwise acquire property, real and personal, on behalf of the company.

ARTICLE V—MEETINGS OF DIRECTORS

Section 1—Regular Meetings

Regular meetings of the directors shall be held on the 15th day of each and every month at the hour of 10 A. M. thereof for the transaction of the business of the company. If said day should be a legal holiday, such meeting shall be held at the same hour on the next succeeding day which is not a legal holiday.

Section 2—Dispensation of Notice

Notice of all regular meetings of the board of directors is dispensed with.

Section 3—Special Meetings

Special meetings of the board of directors (26) may be called any time by the president or two of the directors and notice shall be given of such called meetings by leaving a written or printed notice at the last known place of business or residence of each director at least five (5) days prior to any such meeting. For the purposes of this section, each director must at the first meeting after his election cause to be entered in the minutes the address to which all notices of such meeting of the board of directors may be directed until a similar notice and

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

entry of change of residence has by him been given in writing.

Section 4—Quorum

A majority of the full membership of the board of directors in office shall constitute a quorum at any regular or special meeting thereof for the transaction of business; provided, however, that for the purpose of filling a vacancy on the board of directors, in the event that vacancies therein have been created constituting a majority of said board or more, then, for that purpose, a quorum shall consist of all the remaining members of said board, provided that less than a majority shall constitute a quorum (27) for the purpose of adjourning any meeting to any later time, without notice, until a quorum shall attend.

ARTICLE VI—DUTIES OF DIRECTORS

Section 1—Officers

It shall be the duty of the board of directors to elect the officers hereinafter provided in these by-laws.

Section 2—Records of Proceedings

The board of directors shall cause to be kept a written record of all its meetings and acts and of the proceedings of the stockholders.

Section 3—Annual Report

The board of directors shall cause to be printed and presented at the regular annual meeting of the

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

stockholders a report in writing showing in detail the assets and liabilities of the corporation and the general condition of its affairs. A similar statement shall be printed by the board of directors and presented at any meeting of the stockholders when required by persons holding at (28) least fifty per cent (50%) of the outstanding shares of the corporation.

Section 4—Dividends

The directors shall declare dividends out of the surplus profits of the corporation, if any, when such profits shall in the opinion of the directors warrant such declaration.

Section 5—Supervision

The board of directors shall supervise all officers, agents and employees and see that their duties are properly performed.

Section 6—Management

The board of directors shall manage and control the business of the corporation.

Section 7—General Duties

The board of directors shall do and perform all acts required by law to be by them kept and performed, or to be by this corporation kept or performed. (29)

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

ARTICLE VII—EXECUTIVE COMMITTEE

Section 1—Appointment

The directors may appoint an executive committee from their own number to consist of such number as they shall see fit.

Section 2—Powers

Any executive committee appointed by the board of directors shall have authority to exercise all the powers of the board of directors when said board is not in session, but subject to the immediate disaffirmance by the board at its next meeting after receiving the report of the acts done by said committee. Such committee may act by the written consent of all its members although not formally convened.

Section 3—Removal

Members of this committee may be removed as such and their successors may be appointed by the board and said committee may be abolished at any time by the board of directors. (30)

ARTICLE VIII—OFFICERS

The officers of this corporation shall be a president, one or more vice-presidents, each of whom shall be a member of the board of directors, a secretary, a treasurer, and such other officers as the board may by resolution create. The compensation and tenure of office of all officers other than direc-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

tors shall be fixed by the board of directors. All officers shall be elected by the board of directors and may be removed by said board at any time, either with or without cause.

ARTICLE IX—PRESIDENT

Section 1—Nature of Office

The president shall be the chief executive officer and head of the corporation and shall have general control and management of its business and affairs subject to the control of the board of directors.

Section 2—Duties

The president shall sign all certificates of stock and all conveyances of real property executed in behalf of the corporation and all papers, con- (32) tracts and documents required by the board of directors or proper and necessary to carry on the business of the corporation.

He shall preside at all meetings of the directors and stockholders.

All the powers and duties imposed upon him by law or these by-laws may be exercised by him either within or without the State of Delaware.

ARTICLE X—VICE-PRESIDENTS

The vice-president in the absence or inability to act of the president is vested with all the powers and shall perform all the duties of the president. If there be more than one vice-president, they

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

shall be numbered and each shall act in the absence or inability to act of the president and of all vice-presidents preceding him in number. In such acts and in the execution of writings by such vice-presidents, it shall not be necessary to recite the absence or inability of any preceding officer to act.

ARTICLE XI—SECRETARY

Section 1—Nature of Office

The secretary shall be ex-officio, secretary (33) and clerk of the board of directors and secretary of all stockholders' meetings and of the executive and of all other committees. He shall attend to all their sessions and shall record all votes and minutes of their proceedings in a book or books kept for that purpose.

Section 2—Notices

He shall give or serve all notices required by law or the order of the president and all notices required of all meetings of the stockholders, directors and committees when not otherwise legally given. In case of his absence, inability, refusal or neglect so to do, then such notices may be given or served by any person thereunto directed by the president.

Section 3—Certificates of Stock

He shall keep a book of blank certificates of stock, and shall fill out and countersign all certificates of stock issued, and make entries evidencing such issuance on the margin of said book. (34)

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

Section 4—Corporate Seal

He shall keep the corporate seal and he shall affix said seal to all papers requiring the affixation thereof, including certificates of stock.

Section 5—Transfer Book

He shall keep a transfer book and a stock ledger in debit and credit form showing the number of shares issued to and transferred by any stockholder and the dates of such issuance and transfer.

Section 6—Account Books

He shall keep proper account books, in debit and credit form, of all moneys received by or paid out by the corporation. He shall as often as required by the president make and file in the office of the company a trial balance sheet and shall as often as required make and file in the office of the company a balance sheet showing profits and losses of the company as appear by its books.

Section 7—General Duties

He shall in general perform all other duties (35) required by the president, directors or committees.

ARTICLE XII—TREASURER

The treasurer may be a bank or trust company to be appointed by the board of directors at their discretion, or may be the same person selected to act as secretary of the corporation. The treasurer shall safely keep all moneys of the corporation, deposit-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

ing the same from time to time in such bank or banks as may be designated by the board of directors. The treasurer shall from time to time pay out the funds of the corporation upon checks or drafts signed by such person or persons and in such manner as shall from time to time be determined by the board of directors.

ARTICLE XIII—SHARES OF STOCK

Section 1—Certificates

Certificates of stock shall be of such form and device as the board of directors may direct and each certificate shall be signed by the president and countersigned by the secretary and express on its face its number, date of issuance, the number of shares for which, and the person to whom it is issued. All certificates of stock shall be registered (36) with some person, firm, or corporation selected by the board of directors.

Section 2—Transfer

Shares of the corporation may be transferred at any time by the holders thereof, or by attorney legally constituted, or by their legal representatives, by endorsement on the certificate of stock, but no transfer shall be valid until the surrender of the certificate to be transferred and a receipt is given by the secretary, or any transfer agent hereafter appointed by the board of directors.

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

The surrendered certificate shall be cancelled before a new one is issued in lieu thereof, and the secretary shall preserve the certificate so cancelled as a voucher. If, however, a certificate is lost or destroyed, the board of directors may order a new certificate issued as is by law required or permitted.

ARTICLE XIV

MEETINGS OF STOCKHOLDERS

Section 1—Annual Meeting

The annual meeting of stockholders shall be held on the 15th day of February in each year at the hour of 10 o'clock in the forenoon of said day; (37) provided, however, that if said day should be a legal holiday, such meeting shall be held at the same hour on the next succeeding day which is not a legal holiday.

At such annual meeting, the directors for the ensuing year shall be elected.

Section 2—Dispensation of Notice

Notice of all regular meetings of stockholders is dispensed with. No notice of an annual meeting or of the election to be held thereat need be given and the same is hereby dispensed with.

Section 3—Special Meetings

Special meetings of the stockholders may be called at any time by the president, or by two (2) of the directors, or by the holders of not less than one-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

third ($\frac{1}{3}$) of the shares of stock of the company at any time outstanding, and all such calls shall state the purpose of the meeting and such meetings shall have no power to do any business not stated in the call therefor.

Section 4—Notice of Special Meetings

Notice of the day, hour and place of all (38) special meetings of stockholders shall be given by the parties making the call causing notice thereof to be published in one or more newspapers of general circulation published in the City and County of San Francisco, State of California, for at least three (3) days last preceding the day of meeting, or by a notice in writing signed by the president and delivered to each stockholder either personally or by mail to his registered or last known business or residence address; provided, however, that such written notice when mailed shall be deposited in the United States mails, postage prepaid, at least five (5) days before the day appointed for such meeting.

Section 5—Registration of Address

Each stockholder may register his address with the corporation by written notice thereof delivered by him to the secretary of the corporation.

Section 6—Quorum

For the purpose of the transaction of business, a quorum of any regular or special meeting of the stockholders shall consist of the holders of a ma-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

jority of the stock of this corporation then out- (39) standing, either present in person or by proxy. In the event a quorum be not present at any meeting either general or special, the persons then and there present, either in person or by proxy, may adjourn the same from day to day without further notice, until a quorum shall be present at which time all business which might at the original meeting have come before the same may be transacted.

Section 7—Voting

At all corporate meetings, each stockholder shall have the right to vote either in person or by proxy the number of shares standing in his name.

Section 8—Proxies

All proxies shall be in writing and filed with the secretary. If a proxy shall authorize the holder thereof to vote thereon at any meeting, it shall be sufficient authority for the holder thereof to vote thereon at any adjournment of such meeting.

ARTICLE XV—BOOKS AND PAPERS

The books and such papers as may be placed (40) on file by vote of the stockholders or directors shall at all times in business hours be subject to the inspection of the board of directors or of any stockholder.

ARTICLE XVI—AMENDMENTS

These by-laws may be repealed, altered or amended, or new by-laws may be adopted at the

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

annual or any other meeting of the stockholders by a vote representing two-thirds ($\frac{2}{3}$) of the subscribed capital stock; or the by-laws may be repealed, altered or amended or new by-laws may be adopted by the board of directors of the company from time to time as to said board of directors shall seem fit and proper. (41)

AMENDMENTS TO BY-LAWS OF ASSOCIATED CALITALO HOLDINGS LTD. INCORPORATED.

Article 4, Section 1, Feb 16 1931

“The directors shall not be less than Five (5) nor more than Twenty-one (21) in number and shall be elected by ballot at the annual meeting of the stockholders.

The President of the Corporation may at his discretion appoint an advisory board to consist of not less than Five (5) nor more than twenty-five (25) members, to assist the board of directors, such appointment to be subject to the approval of the Board of Directors. The advisory board is to serve until their successors are appointed or until the termination of office of the Board of Directors whom they are appointed to assist.”

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

Article 1, Section (a) Feb 15th, 1932, Wilmington
Del.

“Location of offices.

The principal office of the corporation shall be in the City of Wilmington, County of New Castle, State of Delaware, and the name of the resident agent in charge thereof is The Corporation Trust Company.

The Corporation may also have an office in the City and County of San Francisco, State of California, and also offices at such other place or places as the Board of Directors may from time to time appoint, or the business of the Corporation may require.”

Article 5, Section 1, Feb 15th, 1932, Wilmington,
Del.

“Regular meetings of the Board of Directors may be held at such place within or without the State of Delaware as shall from time to time be determined by the Board.”

Article 5, Section 3, Feb 15th, 1932, Wilmington
Del

“Special meetings of the Board of Directors may be held within or without the State of Delaware at such place as indicated in the notice or waiver or notice thereof.”

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

Article 14, Section 3, Feb 15th, 1932, Wilmington,
Del

“Regular meetings of stockholders and all meetings of stockholders for the election of Directors shall be held at the office of the corporation in the City and County of San Francisco, State of California.” (42)

Article 14, Section 4, Feb 15th, 1932 Wilmington
Del.

“Special meetings of stockholders other than for the election of Directors may be held within or without the State of Delaware at such place as is indicated in the notice or waiver of notice thereof.”

Article 4, Section 1, Feb 26th, 1932.

“The property and business of this corporation shall be managed and controlled by its board of directors fifteen (15) in number who shall be elected by the stockholders except as otherwise provided in these by-laws.

The Board of Directors may at any time, by amendment of these by-laws, increase or decrease the number of its members and may elect such additional directors, if the number is increased, who shall hold office until the next annual meeting of the stockholders and until their successors are elected and qualified.”

Article 5, Section 1, Feb 26, 1932.

“Regular meetings of the Directors shall be held quarterly on the 15th day of January, April, July

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

and October at the hour of 10 o'clock A. M. thereof for the transaction of the business of the company, if said day should be a legal holiday, such meetings shall be held at the same hour on the next succeeding day which is not a legal holiday."

Article 16, Section 4, Feb 26, 1932.

"Notice of the day, hour and place of all special meetings of stockholders shall be given to each stockholder entitled to vote at such meeting, (1) by publishing a copy of such notice once in one or more newspapers of general circulation published in the City and County of San Francisco, and said publication shall be made on a day not more than thirty (30) days, nor less than three (3) days before the day of such meeting, or (2) by depositing a copy of such notice in the United States mail, postage prepaid, to his address appearing on the stock ledger of the corporation on a day not more than thirty (30) days, nor less than three (3) days before the day of such meeting. If the address of any stockholder does not appear on the stock ledger of the corporation, notice shall be deemed to have been given him of such notice if so deposited in the United States mail, addressed (43) to his last known post office address or to San Francisco, California.

Where the Statutes of the State of Delaware require a notice of a definite number of days to be given to stockholders, for any meeting of stock-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

holders, such notice shall be deemed to have been given in accordance with such provision of statute if said publication is so made or such notice is so mailed the number of days required by such statute before the date of such meeting.

Article 14, Section 3, Jan. 14, 1933.

“Regular meetings of stockholders and all meetings of stockholders for the election of Directors shall be held at either the office of the corporation in the City and County of San Francisco, State of California, or at the principal office of the corporation in the City of Wilmington, County of New Castle, State of Delaware.”

Article 4, Section 1, Jan 14, 1933.

“The property and business of this corporation shall be managed and controlled by its Board of Directors seven (7) in number who shall be elected by the stockholders except as otherwise provided in these By-laws.

The Board of Directors may at any time, by amendment of these By-laws, increase or decrease the number of its members and may elect such additional Directors, if the number is increased, who shall hold office until the next annual meeting of the stockholders and until their successors are elected and qualified.”

Article 14, Section 3, July 15, 1936

“Regular meetings of the stockholders, and all meetings of stockholders for the election of Direc-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

tors, shall be held at the office of the corporation, in the City of Wilmington, County of New Castle, State of Delaware.” (44)

CERTIFICATE OF AMENDMENT OF CERTIFICATE OF INCORPORATION OF ASSOCIATED CALITALO HOLDINGS, LTD., INCORPORATED.

Associated Calitalo Holdings, Ltd., Incorporated, a corporation organized and existing under and by virtue of the provisions of an Act of the General Assembly of the State of Delaware, entitled “An Act Providing a General Corporation Law”, approved March 10, 1899, and the acts amendatory thereof and supplemental thereto, the certificate of incorporation of which was filed in the office of the Secretary of the State of Delaware on January 7, 1930, and recorded in the office of the Recorder of Deeds for New Castle County, State of Delaware, on January 7, 1930, Does Hereby Certify:

First: That at a meeting of the Board of Directors of said Associated Calitalo Holdings, Ltd., Incorporated, duly held and convened, a resolution was duly adopted setting forth an amendment proposed to the certificate of incorporation of said corporation as follows:

“Be It Resolved that the certificate of incorporation of said Associated Calitalo Holdings, Ltd., Incorporated be amended by striking out the con-

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

tents of Article First and by inserting in lieu thereof the following:

‘That the name of said corporation shall be Pacific Empire Holdings, Incorporated’,

and declaring said amendment advisable and further declaring and resolving that said amendment be submitted, for ratification, to the stockholders of said corporation at the annual meeting of the stockholders of said corporation to be held on Thursday, the 15th day of February, 1934;

Second: That thereafter, and on Thursday, the 15th day of February, 1934, pursuant to the aforesaid resolution of its Board of Directors, and pursuant to the by-laws of the corporation setting and fixing Thursday, the 15th day of February, 1934, at the hour of ten o'clock A. M. of said day, at the office of the Company in the City and County of San Francisco, State of California, as the time and place for the holding of the annual meeting of the stockholders of said corporation, the annual meeting of said corporation was duly held; that at said annual meeting held as aforesaid more than a majority of the voting stockholders of said corporation were present in person or by proxy; that at said meeting a vote of the stockholders by ballot, in person or by proxy, was taken for and against said proposed amendment, which vote was conducted by F. E. Helwick and H. R. Bardwell, two Judges

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

appointed for that purpose by said meeting; and that at said meeting, by vote conducted as aforesaid, said amendment was adopted pursuant to Section 26 of the General Corporation Law of Delaware as amended, the persons or bodies corporate holding the majority of the issued and outstanding voting stock of said corporation voting for said proposed amendment, to-wit, 1,368,914 shares of common stock were voted for said amendment out of the total shares outstanding of 2,537,699 shares of common stock, and entitled to vote, the said shares being the only stock of the company issued and outstanding and entitled to vote, all as appears by the duplicate certificate made by said Judges, one of which is hereto attached marked "A" and made a part hereof.

In Witness Whereof, Said Associated Calitalo Holdings, Ltd., Incorporated has caused its corporation seal to be hereunto affixed and this certificate to be signed by M. Maffei, its President, and L. R. Arnold, its Secretary, this 1st day of May, 1934.

ASSOCIATED CALITALO HOLDINGS,
LTD., INCORPORATED

[Seal]

By M. MAFFEI (Signed)

President

By L. R. ARNOLD (Signed)

Secretary

[Endorsed]: Filed 4-20-43.

(Testimony of Michael Maffei.)

Mr. Scampini: I now ask leave to read into the record one paragraph of one of the articles, and two or three paragraphs from the by-laws, if I may.

The Court: Proceed.

Mr. Scampini: Paragraph XI of the Articles of Incorporation reads as follows (reading).

Reading from the by-laws, I desire to read at this time the following applicable portions. Section 1 of the by-laws found on page 22 of the minute book, Volume 1 deals with vacancies, term of office of the board of directors, and the section reads as follows, Article IV. Directors, election, term of office vacancies. I will read Section 4 (reading).

Now, Article IV of the by-laws dealing with the powers of directors on page 24, Section 1, reads as follows (reading). [57]

On page 29 we have a section dealing with management reading as follows (reading). Also, "General duties" (reading).

The next section I desire to read into the record is the section dealing with the executive committee, Article VII, Section 1, "Appointment and powers" (reading).

The Court: We will take a recess until 2:00 o'clock.

(A recess was here taken until 2:00 o'clock p.m.)

[58]

(Testimony of Michael Maffei.)

(Plaintiff's Exhibit No. 7—Continued)

appointed for that purpose by said meeting; and that at said meeting, by vote conducted as aforesaid, said amendment was adopted pursuant to Section 26 of the General Corporation Law of Delaware as amended, the persons or bodies corporate holding the majority of the issued and outstanding voting stock of said corporation voting for said proposed amendment, to-wit, 1,368,914 shares of common stock were voted for said amendment out of the total shares outstanding of 2,537,699 shares of common stock, and entitled to vote, the said shares being the only stock of the company issued and outstanding and entitled to vote, all as appears by the duplicate certificate made by said Judges, one of which is hereto attached marked "A" and made a part hereof.

In Witness Whereof, Said Associated Calitalo Holdings, Ltd., Incorporated has caused its corporation seal to be hereunto affixed and this certificate to be signed by M. Maffei, its President, and L. R. Arnold, its Secretary, this 1st day of May, 1934.

ASSOCIATED CALITALO HOLDINGS,
LTD., INCORPORATED

[Seal]

By M. MAFFEI (Signed)

President

By L. R. ARNOLD (Signed)

Secretary

[Endorsed]: Filed 4-20-43.

(Testimony of Michael Maffei.)

Mr. Scampini: I now ask leave to read into the record one paragraph of one of the articles, and two or three paragraphs from the by-laws, if I may.

The Court: Proceed.

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Reading from the by-laws, I desire to read at this time the following applicable portions. Section 1 of the by-laws found on page 22 of the minute book, Volume 1 deals with vacancies, term of office of the board of directors, and the section reads as follows, Article IV. Directors, election, term of office vacancies. I will read Section 4 (reading).

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The Court: We will take a recess until 2:00 o'clock.

(A recess was here taken until 2:00 o'clock p.m.)

[58]

(Testimony of Michael Maffei.)

Afternoon Session

April 20, 1943—2:00 o'clock P. M.

MICHAEL MAFFEI,

recalled:

Direct Examination

(resumed)

Mr. Scampini: I will read now into the record from page 32 of Volume 1, dealing with the powers of the president, Section 1 (reading).

On page 33 of the by-laws, dealing with the powers of the vice-president, Article X (reading).

Q. Now, Mr. Maffei, on or about January 8, 1941, in the Pacific Empire Holdings, Incorporated, was there a president functioning?

A. There was.

Q. That was you? A. That is right.

Q. How many vice-presidents did you have functioning?

A. I think Mr. Arnold was vice-president.

Q. Wasn't Mr. Bercut also second vice-president? A. Yes.

Q. Was there a secretary? A. Yes.

Q. Who was the secretary, do you recall?

A. I think it was Mr. Arnold.

Q. The minute book will so indicate and we will come to it. Now, dealing with the power of the

(Testimony of Michael Maffei.)

secretary, Article XI., Section 1: "Nature of Office" (reading).

On page 42 of Volume 1, Article V., Section 1 of by-laws was amended on February 15, 1932 so as to provide that "Regular meetings of the Board of Directors may be held at such place within or without the State of Delaware as shall from time to time be determined by the board."

"Special meetings of the Board of Directors may be held within or without the State of Delaware at such place as is indicated in the notice or waiver or notice thereof." [59]

Article XIV., Section 3 was amended February 15, 1932 so as to provide that "Regular meetings of stockholders and all meetings of stockholders for the election of directors shall be held at the office of the corporation in the City and County of San Francisco, State of California."

On page 43 of the minute book we find that Article IV., Section 1 of the by-laws was amended again to provide that "The property and business of this corporation shall be managed and controlled by its board of directors, fifteen in number, who shall be elected by the stockholders, except as otherwise provided in these by-laws."

"The board of directors may at any time by amendment of these by-laws, increase or decrease the number of its members and may elect such additional directors, if the number is increased, who shall hold office until the next annual meeting of the

(Testimony of Michael Maffei.)

stockholders and until their successors are elected and qualified."

On page 44 we have a further amendment to Article IV. that "The property and business of this corporation shall be managed and controlled by its board of directors, seven in number, who shall be elected by the stockholders except as otherwise provided in these by-laws."

Q. I will ask you, Mr. Maffei, do you recall any further amendment of the by-laws providing the number shall consist of seven directors?

A. I do not.

Q. You stated this morning that one of the predecessor companies of Pacific Empire Holdings, Inc., formerly known as Associated Calitalo Holdings, Limited, was the Brotherhood Investment Corporation, is that right?

A. That is right.

Q. In fact, the Brotherhood Investment Company was the owner of [60] and founder of the City National Bank of San Francisco?

A. That is right.

Q. Did the Brotherhood Investment Corporation have a substantial number of stockholders, Mr. Maffei, to your knowledge?

A. I could not tell exactly, but they did have.

Q. Will you please state who incorporated and how the Brotherhood Investment Corporation came into existence, if you know?

Mr. Naus: One moment: I object to it as calling for an opinion and conclusion unless this witness

(Testimony of Michael Maffei.)

participated. There is no foundation laid.

The Court: I will sustain the objection on the ground that no foundation has been laid.

Mr. Scampini: Were you one of the officers or directors of the Brotherhood Investment Corporation? A. I was not.

Q. Do you know who the principal and main stockholders were, Mr. Maffei?

A. I could not tell you now, no.

Q. Now, you testified this morning in answer to one of my questions, if I understood you correctly, and if not will you correct me, that on or about 1931 the Associated Calitalo Holdings Corporation purchased a substantial amount of stock of Merchants Ice & Cold Storage Company from Frederic Vincent, William A. Sherman, George A. Stratton, and Joseph McInerney, is that right? A. Yes.

Q. Were you a director of the company at that time, Mr. Maffei?

A. Of the holding company?

Q. Of the Associated Calitalo Holdings, Limited, Incorporated? A. I was.

Q. On pages 3 to 15 inclusive of Volume 2 of the minute book there is purported to be a special meeting of the board of directors of Associated Calitalo Holdings, Limited, Incorporated, called [61] for the purpose of approving the execution of a contract dated May 16, 1931 by and between Associated Calitalo Holdings, Limited, Incorporated, a Delaware corporation, first party, Joseph L. McIn-

(Testimony of Michael Maffei.)

erney, a resident of San Francisco, second party, William A. Sherman, resident of San Francisco, third party, and George Stratton and Frederic Vincent, fourth parties, and ask you to look at that contract, which is found on pages 9 to 15, inclusive, of Volume 2, and state whether or not that is a true copy of the agreement under which these shares were purchased from these parties.

Mr. Naus: Objected to as calling for secondary evidence of a writing. The original contract compared with that will tell whether or not that is a true copy.

Mr. Scampini: That is part of the minutes, that the directors authorized the execution.

The Court: Is the original available?

Mr. Scampini: I have not been able to locate the original.

The Court: Where is the original?

Mr. Naus: I have not the slightest idea.

Mr. Scampini: I am just trying to show and offer in evidence a meeting of the board of directors called for the purpose of authorizing the execution of this contract—

The Court: Is the contract recited in the minutes?

Mr. Scampini: Yes, in haec verba.

Mr. Naus: I make no objection to that, because I have already agreed to it.

A. That is correct.

Mr. Scampini: May it please the Court, I now ask that the record show that I am reading into the

(Testimony of Michael Maffei.)

record the minutes beginning with page 2 of Volume 2, entitled, "Waiver of notice," [62] and ending on page 15. On page 2 it deals with the special meeting of the board of directors called by the Associated Calitalo Holdings, Limited, Inc. for May 9, 1931, and authorizing the execution of a certain agreement which is found beginning with page 9 and ending with page 15.

Q. Now, you said this morning, if I recall, Mr. Maffei, and if I quote you incorrectly I stand corrected, that you thought or believed that Mr. Bercut became a director of the holding company, if I remember accurately, sometime in 1931, you said.

Mr. Naus: That was not his testimony.

Mr. Scampini: When did he become a director, do you recall?

A. I think Mr. Bercut was a director sometime between 1929 and 1930. The minute book will show that.

Q. I will now read from the minutes, Volume 2, beginning with page 65, being minutes of the meeting of the stockholders held February 15, 1933.

Mr. Naus: Are you trying to establish that he was first a director on that date?

Mr. Scampini: That is right, the first time he was a director was on February 9, 1933.

I will now read into the record the minutes of the special meeting of the board of directors of Associated Calitalo Holdings, Limited, Inc. held January 4, 1934, found on pages 149 to 153, inclusive,

(Testimony of Michael Maffei.)

which minutes deal with the incorporation or creation of Pacific Empire Corporation, in Volume 3, and the minutes recite that the following director was absent: Peter Bercut, the directors present being George W. Hope, Luigi Giachini, James Bernardini, M. Maffei, L. R. Arnold, and A. A. Heer, Jr. Peter Bercut is absent. That is the signature of Mr. Maffei, is it [63] not? A. Yes.

Q. And that is Mr. Arnold's?

A. That is right.

Q. On page 154 of Volume 3, Mr. Maffei, and as a part of the minutes which I have just read into the record, there appears to be an Exhibit A referred to in the minutes, on the stationery of Associated Calitalo Holdings, Limited, addressed to the stockholders of the City National Bank, San Francisco, Liquidating, dated August 10, 1933, and I will ask you whether or not that is a facsimile of your signature at the bottom of that letter.

A. It is.

Q. Was this letter sent to the stockholders of the City National Bank of San Francisco?

A. It must have been sent out.

Mr. Scampini: I will ask that that letter be read into the record. Now I am reading from the minutes of the annual meeting of the stockholders of Associated Calitalo Holdings, Limited, held on Thursday, February 15, 1934, at the office of the company in the City and County of San Francisco, found on pages 166 to 168, inclusive, and especially the balance sheet rendered as of December 31, 1933,

(Testimony of Michael Maffei.)

designated as Exhibit A, attached to said minutes, on page 169, and I will ask you whether that is your signature at the bottom. A. Yes.

Q. Is that the signature of Arnold acting as Secretary of the meeting and you as chairman of the meeting? A. Yes.

Q. And the balance sheet of the company found on page 169 entitled "Exhibit A" is the balance sheet of the company as of December 31, 1933, is that right? A. That is right.

Q. Showing total assets of the book value of \$832,074.60, is that right? A. Yes.

Q. Now, the Merchants Ice & Cold Storage stock on that date is stated as of the par value of \$31,201.20. A. Yes. [64]

Q. That is December 31, 1933? A. Yes.

Q. On page 172 it is recited that Mr. Maffei, L. R. Arnold, A. A. Heer, Jr., James Bernardini, Luigi Giachini, Peter Bercut and George Hope were elected as directors. Now, following that meeting, there was, was there not, as shown by the minute book, a meeting of the board, which is found on pages 174 et seq., which appears to have been held pursuant to a waiver of notice and I will ask you whether or not you recognize the signatures which are found on page 174. A. Yes.

Q. Is Peter Bercut's signature there?

A. Yes.

Q. I desire to read from page 175, Volume 3, in which it is recited: "The meeting thereupon proceeded to election of officers, whereupon the fol-

(Testimony of Michael Maffei.)

lowing names were proposed for the respective offices shown: M. Maffei, President, A. A. Heer, Jr., First Vice-President, Peter Bercut, Second Vice-President, L. R. Arnold, Secretary-Treasurer."

Who was A. A. Heer, Jr. at that time?

A. In what way?

Mr. Naus: He was a director.

Mr. Scampini: Was he a director?

A. That is what he was.

Mr. Scampini: I now read into the record from Volume 4 of the minute book, minutes of meeting of board held February 19, 1935, found on pages 42 et seq., pursuant to a waiver of notice of special meeting found on page 42 signed apparently by all the directors, and ask you whether or not you recognize the signatures of the directors on that page. A. They are.

Q. Mr. Bercut and yourself and Mr. Arnold are also here? A. Yes.

Q. I now read from the minutes on page 42: "The meeting thereupon proceeded to the election of officers, thereupon the following names were proposed for the respective offices shown: M. Maffei [65] President, L. R. Arnold, Vice-President and Secretary, Peter Bercut, Second Vice-President, A. A. Heer, Jr., Treasurer and Assistant Secretary."

On page 43 it is recited, "The chairman announced that the election of an executive committee was the next order of business, thereupon, the fol-

(Testimony of Michael Maffei.)

lowing names were proposed: M. Maffei, L. R. Arnold, Peter Bercut.

“The chairman declared the nominations closed, thereupon by unanimous vote of all directors present, the individuals nominated were declared elected as members of the executive committee, to hold office during the ensuing year, or until their successors have been elected.”

I now read from page 46, etc. of Volume 4, dealing with the meeting of the executive committee of Pacific Empire Holdings, Incorporated, held March 30, 1935, in which it is recited that, “The following members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut. Absent none.”

“M. Maffei, President, acted as chairman of the meeting, and L. R. Arnold acted as secretary.

“The chairman determined the existence of a quorum proper and sufficient to transact business and thereupon called the meeting to order.

“The First Vice-President advised the Executive Committee that pursuant to the authorization granted to this Committee by resolution adopted by the Board of Directors in the Special Meeting of February 19, 1935, negotiations were carried on with the Brotherhood of Locomotive Engineers at Cleveland, Ohio, for the purpose of discounting the \$100,000.00 note of that organization owed by this company, maturing December 17, 1935. As a result of these negotiations, the Brotherhood of Locomotive Engineers agreed to the dis- [66] count of the

(Testimony of Michael Maffei.)

said note at a figure to net this corporation the sum of \$80,000.00. Subsequently, negotiations were carried on with the Pacific National Bank of San Francisco, for the purpose of obtaining a more favorable discount, resulting that Pacific National Bank has agreed to discount the \$100,000.00 note of the Brotherhood of Locomotive Engineers at a figure to net the corporation the sum of \$90,000.00.

“Thereupon, by motion duly made, seconded, and unanimously carried, the following resolution was adopted:

“Whereas, the policy and general plan of the management calls for the immediate discount of the \$100,000.00 note of the Brotherhood of Locomotive Engineers, owned by this corporation, maturing December 17, 1935, for the best interests of the corporation, therefore be it

“Resolved: That the \$100,000.00 note herein referred to, be discounted with the Pacific National Bank of San Francisco, for the amount to net this corporation the sum of \$90,000.00, and be it

“Further resolved: That the President and the First Vice-President & Secretary, and the Treasurer be, and they hereby are authorized to pay from the proceeds thereof, any liens against said note, and to sign any documents necessary to carry out the purpose of this resolution.”

(Testimony of Michael Maffei.)

It appears on page 48, after this meeting, that you three members of the executive committee present approved the minutes by their signature. Do you find the signatures of Maffei, Arnold and Bercut there? A. That is correct.

Q. Then there is what purports to be Exhibit A found in the minutes on page 49, and this purports to be a letter dated April [67] 1, 1935, from Associated Calitalo Holdings, Limited to Stockholders of Pacific Empire Holdings, Inc., and appears to have been issued by the order of the board of directors over the signature of yourself as president, do you recognize it? A. Yes.

Q. Do you recognize that?

A. Yes, it went out.

Q. I notice, here, Mr. Maffei, on balance sheet which is Exhibit B, referred to in the minutes, under the heading of Assets of the Company, there is listed preferred stock of Merchants Ice & Cold Storage Company, \$41,490, common stock of Merchants Ice & Cold Storage Company, \$442,527.11, and opposite said two items there is a note marked "B", which is directed to a notation at the bottom of the balance sheet, opposite the small letter "b" in parentheses, which reads as follows: "Valuation based upon the value stated by the balance sheet of Merchants Ice & Cold Storage Company as of December 31, 1934, certified to by Messrs. Haskins & Sells, certified public accountants. No consideration has been given to unpaid cumulative dividends accruing on the preferred stock."

(Testimony of Michael Maffei.)

Now, Mr. Maffei, when this statement was sent out to the stockholders, I note that it recited in the minutes as follows:

“The Vice-President further presented the President’s letter and the printed consolidated balance sheet of the corporation, as prepared by the Treasurer for the purpose of advising the stockholders of the condition of the corporation as of the close of business, December 31, 1934, the said consolidated balance sheet and the books of the corporation and subsidiaries having been adjusted to reflect the estimated fair or liquidating value of all of the assets owned by the company.”

Did you at that time believe that the valuation placed upon these blocks of shares of preferred and of common stock was a [68] fair, reasonable value for the blocks of stock?

A. According to the statement of the Merchants Ice & Cold Storage Company it was.

Q. You actually bona fiedly believed that was a fair valuation to be placed on those shares of stock?

A. According to the figures of the Merchants Ice & Cold Storage Company.

Q. And that was an audit prepared by Haskins & Sells of the condition of affairs of the Merchants Ice & Cold Storage Company?

A. That is right.

Q. And the value placed on that stock was the value which you had from this audit? A. Yes.

Q. And Mr. Heer was at that time your treasurer? A. Yes.

(Testimony of Michael Maffei.)

Q. This block of stock which now aggregates a little over \$483,000 represents a very substantial increase over the \$30,000 which was reflected in the balance sheet of the company for the previous year. Does that reflect the result of the acquisition of the block of shares which were agreed to be sold to the company by William A. Sherman, George Stratton, Frederic Vincent and Joseph McInerney?

A. Yes.

Mr. Scampini: I am now reading into the record, may it please the Court, the minutes of the executive committee meeting of the Pacific Empire Holdings, Inc., held May 8, 1935, at the hour of 12:30 p. m., at the company's office, found on pages 52 and 53, Volume 4 of the minute book, at which meeting it is represented that the following were present: M. Maffei, L. R. Arnold, Peter Bercut. I will ask you whether you find the signatures of those three gentlemen at the end of the minutes under the head of "Approved"? A. Yes.

Q. Found on page 53? A. Yes.

Mr. Scampini: May it please the Court, I will read into [69] the record the following portion of the minutes:

"The First Vice-President reported to the committee upon the result of the negotiations carried on by him with Mr. Joseph McInerney"—at that time, Mr. Maffei, was Mr. Arnold the First Vice-President? A. Yes.

Mr. Scampini: "For the purpose of reorganizing

(Testimony of Michael Maffei.)

the corporation's indebtedness to the said Joseph McInerney, in order that the corporation and its affiliated company, Pacific Empire Corporation, could be placed in the position to loan funds to Merchants Ice & Cold Storage Company, enabling that company to meet its interest and sinking fund requirements on its bond outstandings which became due on April 1, 1935.

"Consequently, a tentative verbal agreement having been effected with Mr. Joseph McInerney prior to April 1, 1935, the corporation obtained sufficient funds permitting it and Pacific Empire Corporation to reloan to Merchants Ice and Cold Storage Company the sum of \$35,000. The First Vice-President then presented the agreement, to be dated this date, to be entered into between the said Joseph McInerney, Pacific Empire Corporation, Pacific Empire Holdings, Incorporated, and Merchants Ice & Cold Storage Company."

"Thereupon, after full and complete discussion of all matters concerned and included in the Agreement, hereinabove referred to, upon motion duly made, seconded, and unanimously carried, the following resolution was adopted:

"Resolved: That the Agreement made and entered into on the 8th day of May, 1935, by and between this corporation in conjunction with Pacific Empire Corporation and Merchants Ice & Cold Storage Company, and Joseph McInerney, herein referred to as Exhibit 'A';

(Testimony of Michael Maffei.)

the two year Note of this [70] corporation signed jointly with Pacific Empire Corporation, and guaranteed by Merchants Ice & Cold Storage Company, in favor of the said Joseph McInerney, in the sum of \$50,000.00 herein referred to as Exhibit 'B'; the letter dated May 8, 1935, signed jointly by this corporation and Pacific Empire Corporation addressed to Joseph McInerney, herein referred to as Exhibit 'C'; the Assignment of Collateral dated May 8, 1935, signed jointly by this corporation and Pacific Empire Corporation in favor of Joseph McInerney, herein referred to as Exhibit 'D'; and the Acknowledgment of Satisfaction dated May 8, 1935, signed by Joseph McInerney in favor of this corporation, herein referred to as Exhibit 'E', be, and each of them are, hereby accepted, ratified, and approved, and be it

“Further Resolved: That the President and the First Vice-President & Secretary of this corporation be, and they are, hereby authorized and directed to sign on behalf of the corporation, the documents hereinabove referred to, and any other documents necessary in order to carry out the purpose of this resolution.”

Now, Mr. Maffei, I show you here what purports to be an original contract dated May 8, 1935, between Empire Corporation, a California corporation, and Pacific Empire Holdings, Inc., a Delaware corporation, as first parties, Merchants Ice &

(Testimony of Michael Maffei.)

Cold Storage Company, a California corporation, hereinafter known as second party, and Joseph McInerney, hereinafter known as third party, and it appears to be signed "Pacific Empire Corporation by M. Maffei, President, by A. A. Heer, Jr., Secretary, Pacific Empire Holdings, Inc., a Delaware corporation, by M. Maffei, President, by L. R. Arnold, Secretary, and Merchants Ice & Cold Storage [71] Company by W. A. Sherman, President, by Walter O. H. Plagemann, Secretary, second party, and Joseph McInerney, third party," and referred to in the minutes of this executive committee meeting and ask you if you recall that transaction.

A. Yes.

Mr. Naus: You may retain the original, and if there is any question raised it will be available.

Mr. Scampini: I do not desire to read it in haec verba, but I think it should be deemed that it was read into the record and the reporter will make a copy of the agreement entitled Exhibit A found on pages 54 to 58, inclusive, of Volume 4 of the minute book, which is the typewritten copy of the original agreement, which has been exhibited to Mr. Naus.

Mr. Naus: These minute books have been marked for identification. I do not see any necessity for the reporter to copy anything in. I make no objection to its going in evidence, but I do not see why the reporter should copy it.

Mr. Scampini: May it be deemed read?

Mr. Naus: The original minute books are in the

(Testimony of Michael Maffei.)

possession of the clerk, marked for identification, and whatever is received in evidence is in evidence without copying.

Mr. Scampini: The only objection is that the minute books properly should stay with the corporation officer, and only about five per cent of what is in the minute books is applicable or material to the controversy here, and I think it would be much better if you read the pertinent portions into the record.

The Court: I think it is important in presenting the case that I have an opportunity to follow anything that it is desired to call the court's attention to.

Mr. Naus: There will be some portions we will want to call attention to. [72]

The Court: Very well. Proceed.

Mr. Scampini: Q. Mr. Maffei, you said that you recalled that transaction, did you not?

A. Yes.

Q. Will you state the circumstances under which that agreement was entered into and the purpose of that agreement?

Mr. Naus: One moment: I make no objection as to the witness answering as to the circumstances under which it was made but when it asks for the purpose of the agreement, I think we had better leave the agreement speak for itself.

Mr. Scampini: Strike out the question.

Q. Will you please state the circumstances under which that agreement was entered into?

(Testimony of Michael Maffei.)

A. Well, I can't recall what the purpose of that contract was.

Q. But do you recall the circumstances under which this agreement was entered into?

A. I can't just recall what the purpose was at that time.

Q. What were the conditions of the Merchants Ice & Cold Storage Company at that time, if you recall?

Mr. Naus: Objected to as vague and indefinite. I don't know what he means by conditions.

Mr. Scampini: Q. What was the financial condition of the Merchants Ice & Cold Storage Company?

A. They needed financing.

Q. Was the Merchants Ice & Cold Storage Company in need of additional funds?

A. Additional capital.

Q. How much was it in need of financially?

A. Whatever they needed.

Q. Do you recall the reason why the company needed those funds at that time?

A. I think at that time they were paying the bonded interest.

Q. The bond interest or bond principal?

A. The interest and the [73] retirement.

Q. Did the Merchants Ice & Cold Storage Company have any funds with which to meet the interest on the bonds and the principal obligation at that time?

A. No.

Q. How did it obtain the funds?

(Testimony of Michael Maffei.)

A. Well, through our holding company.

Q. What did the holding company do in order to obtain the funds?

A. Well, they had to get the money.

Q. Whom did they get the money from?

A. They got some money from the Pacific National Bank.

Q. Did you also get \$50,000 recited in this agreement from Joseph McInerney?

A. I don't know as to that \$50,000.

Q. You executed a note to him?

A. We owed Joseph McInerney for the stock that we purchased from him.

Q. Did you pledge to Joseph McInerney the collateral which is entitled Exhibit "A" to secure the pledge?

A. I think the money was secured from a pledge.

Mr. Scampini: I will offer the contract in evidence.

The Court: It may be admitted and marked.

(The contract was marked "Plaintiff's Exhibit 8.")

PLAINTIFF'S EXHIBIT 8

AGREEMENT

This Agreement made and entered into at San Francisco, California, this 8th day of May, 1935 between Empire Corporation, a California corporation, and Pacific Empire Holdings, Inc., a Delaware corporation, hereinafter known as First Parties, Merchants Ice & Cold Storage Company, a Califor-

(Testimony of Michael Maffei.)

nia corporation, hereinafter known as Second Party, and Joseph McInerney, hereinafter known as Third Party,

Witnesseth:

The parties hereto are contracting relative to the following facts:

On March 30, 1935 Second Party was indebted to certain of its bondholders in the principal sum of Forty Thousand (\$40,000.00) Dollars, together with accrued interest, being the amount due and payable by said Second Party under its trust indenture for the installment of principal and interest due on April 1, 1935. Second Party did not have sufficient funds with which to meet and pay said installment of principal and interest in full.

First Parties together on said day were, and now are, the owners of a majority of the issued and outstanding common stock of said Second Party, and by virtue of said ownership First Parties on said day were, and now are, in control of the management of Second Party and did, on said day, and still have a very substantial interest in the preservation of the solvency and financial integrity of Second Party. By reason of said premises First Parties were desirous of enabling Second Party to meet, pay and discharge said 1935 installment of principal and interest due under its trust indenture. First Parties, in order to obtain the funds necessary to be advanced to Second Party, for the purpose of enabling said Second Party to meet, pay

(Testimony of Michael Maffei.)

and discharge its 1935 maturities of principal and interest, did thereupon borrow from Third Party the sum of Fifty Thousand (\$50,000.00) Dollars, and did thereupon loan and advance said sum to Second Party and Second Party did use the proceeds of said loan with which to meet, pay and discharge its said 1935 maturities of principal and interest;

Now Therefore, in consideration of the premises and for the purpose of giving to said Third Party evidence of said indebtedness, and for the purpose of securing the payment of said indebtedness to Third Party in accordance with a certain Memorandum of Agreement executed between First Parties and Third Party at the time of the delivery of the said sum of Fifty Thousand (\$50,000.00) Dollars by Third Party to said First Parties, the parties hereto do hereby agree with each other, as follows, to-wit:

First Parties do hereby agree to forthwith execute and deliver to Third Party their joint and several promissory note in the sum of Fifty Thousand (\$50,000.00) Dollars, due and payable as to principal on the 1st day of April, 1937; said note shall bear interest at the rate of six per cent (6%) per annum, due and payable one hundred and eighty (180) days after the execution of said note, and semi-annually thereafter; said promissory note shall be endorsed on the back thereof, and guaranteed by Second Party as to payment. In addition

(Testimony of Michael Maffei.)

thereto, and for the purpose of securing the payment of said promissory note according to its tenor, First Parties do hereby agree to forthwith deliver to Third Party, in pledge, the following securities, to-wit:

a) All of those shares of the capital stock of Merchants Ice & Cold Storage Company (be they common or preferred) now owned by either one of First Parties and fully described as to certificate number and number of shares on the hereto attached memorandum of securities pledged, which memorandum is made a part hereof as though herein at length set forth.

b) Three Hundred and Fifty (350) shares of the common capital stock of Pacific National Bank of San Francisco, a national banking association, represented by the certificates of stock and the number of shares therein mentioned as shown on the hereto attached memorandum of securities pledged.

c) An assignment executed by both of said First Parties to Third Party of all of their respective right, title, interest and equity in and to 421 number of shares of said common capital stock of said Pacific National Bank of San Francisco, now on deposit with said bank as collateral security for a loan made by said bank to Merchants Ice & Cold Storage Company in the sum of Ten Thousand (\$10,000.00) Dollars, which note was guaranteed as to payment by said First Parties.

d) First Parties do hereby agree to cause said

(Testimony of Michael Maffei.)

promissory note executed by Merchants Ice & Cold Storage Company to said bank in said sum of Ten Thousand (\$10,000.00) Dollars, or any renewal thereof, to be paid within a reasonable time from date hereof, and, upon such payment, the said Pacific National Bank of San Francisco shall be directed and authorized, and it is by these presents so directed and authorized, to deliver all of said shares of said common capital stock of Pacific National Bank of San Francisco to Third Party herein, to be held by said Third Party pursuant to, and in accordance with, this pledge.

All of the parties hereto further agree that in the event First Parties shall become and be in default in any of the payments of said promissory note, or any other of the terms, conditions and agreements herein set forth, Third Party may, if such default shall be continued for a period of thirty (30) days, forthwith take such steps as he may deem necessary or advisable to foreclose any or all of the assets so pledged, and to sell any or the whole thereof, or any or all of the right, title, interest or claim of First Parties therein, and shall apply the moneys received therefrom, first to the payment of costs therein, including reasonable attorneys' fees, then to the payment of interest accrued and unpaid, and the balance to the reduction or discharge of the principal sum of said note.

First Parties waive the provisions of Section 3005 of the Civil Code of California relative to the

(Testimony of Michael Maffei.)

manner of such pledges and agrees that any such sales may be public or private, and upon such notice or notices to First Parties as Third Party shall elect, and First Parties further agree to pay to Third Party whatever default may result after applying the net proceeds of such sale to the payment of said principal and interest thereon.

First Parties further agree that in the event the securities above referred to should decrease in its reasonable market value below the sum of Fifty Thousand Dollars (\$50,000.00), to forthwith, upon demand of Third Party, increase the collateral held in pledge to a sum above Fifty Thousand Dollars (\$50,000.00) and maintain the same at the reasonable market value of Fifty Thousand Dollars (\$50,000.00) or more until the termination of this agreement.

It is further agreed by and between the parties hereto that should any such foreclosure sale or sales be made, Third Party or his successors or assigns directly or in the name of any other person shall have the right to purchase any securities at such sale or sales.

In the event of any suit to enforce or defend any of the rights or claims of Third Party hereunder, First Parties agree to pay the costs and reasonable attorneys' fees therein, and that the amount thereof shall be secured by pledge or pledges herein provided. This memorandum is intended to express the agreement of the parties, and all of them agree to execute forthwith and in the future any and all

(Testimony of Michael Maffei.)

instruments or other documents which Third Party may deem necessary advisable to effect its purposes.

This agreement shall be binding upon and shall inure to the benefit of the heirs, executors, administrators, successors and assigns of all the parties hereto.

In Witness Whereof, First Parties have caused this agreement to be executed by their proper officers, thereunto duly authorized and their corporate seals to be affixed, and Second Party has caused this agreement to be executed by its proper officers, thereunto duly authorized and its corporate seal to be affixed, and Third Party has subscribed his name the day and year and at the place first herein mentioned.

PACIFIC EMPIRE CORPORATION

By M. MAFFEI

[Seal] President

By A. A. HEER, JR.

Secretary

PACIFIC EMPIRE HOLDINGS, INC.,

a Delaware corporation

By M. MAFFEI

[Seal] President

By L. R. ARNOLD

Secretary

First Parties

(Testimony of Michael Maffei.)

MERCHANTS ICE AND COLD
STORAGE COMPANY

By WM. A. SHERMAN

[Seal] President

By WALTER O. H. PLAGEMANN

Secretary

Second Party

JOSEPH McINERNEY

Third Party

\$50,000.00

April 1, 1935

Two (2) years after date, we, Pacific Empire Corporation, and Pacific Empire Holdings, Inc., jointly and severally agree and promise to pay to the order of Joseph McInerney, at the City and County of San Francisco, State of California, Fifty Thousand Dollars (\$50,000.00) in lawful money of the United States of America, with interest thereon at the rate of Six Per Cent (6%) per annum, from the first day of April, 1935, until paid, interest to be paid One Hundred Eighty (180) days after date of the execution of this note, and semi-annually thereafter, and if not so paid, the whole sum of both principal and interest to become due and payable upon the expiration of thirty days grace, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any part thereof, we jointly and severally promise and agree to pay in addition to the costs and disbursements provided by statute such additional sum as

(Testimony of Michael Maffei.)

the court may adjudge reasonable as attorneys' fees to be allowed in said suit or action.

In Witness Whereof, we have these presents caused to be executed by our officers, thereunto duly authorized by a resolution of our respective Board of Directors.

PACIFIC EMPIRE CORPORATION

By M. MAFFEI

[Seal] President

By A. A. HEER, JR.

Secretary

PACIFIC EMPIRE HOLDINGS, INC.,

By M. MAFFEI

[Seal] President

By L. R. ARNOLD

Secretary

GUARANTY OF PAYMENT

For value received, the undersigned does hereby guaranty and warrant the payment of the within note by the makers thereof, according to its tenure, and does hereby specifically waive any notice of default, non-payment, or protest, whether principal or interest, hereby ratifying any and all things or acts done by the holder of said note relative to any extension of maturity, either of principal or interest, or any renewal thereof.

In Witness Whereof, the undersigned has caused these presents to be executed this 8th day of May,

(Testimony of Michael Maffei.)

1935, by its officers thereunto duly authorized, and the Seal of the corporation to be affixed.

MERCHANTS ICE AND COLD
STORAGE COMPANY

By WM. A. SHERMAN

[Seal]

President

By WALTER O. H. PLAGEMANN
Secretary

(Testimony of Michael Maffei.)

EXHIBIT "A"

MEMORANDUM OF SECURITIES PLEDGED

Stock of Merchants Ice and Cold Storage Company			Name
Certificate Number	Common Shares	Preferred Shares	
90	4,838		Helen H. Vincent
109	1,000		Con T. Shea
108	1,000		Con T. Shea
107	1,000		Con T. Shea
106	1,000		Con T. Shea
105	1,000		Con T. Shea
104	1,000		Con T. Shea
103	1,000		Con T. Shea
102	1,000		Con T. Shea
75	893 $\frac{1}{3}$		Anita M. Schiaulini
88	6,838		Florence Stratton
45	5,133 $\frac{1}{3}$		Florence Stratton
87	11,170		M. Carlson
10		3,990	M. Carlson
96	71		M. Maffei
92	1,600		Calitalo Investment Corporation
94	6,976		Associated Calitalo Holdings, Ltd., Inc.
13	2,893 $\frac{1}{3}$		Do
	1,531 $\frac{1}{3}$		Associated Sales Corporation
Stock of Pacific National Bank of San Francisco			Name
Certificate Number	Common Shares	Preferred Shares	
A 218	50		Pacific Empire Corporation
A 216	100		Pacific Empire Corporation
A 215	100		Pacific Empire Corporation
A 217	100		Pacific Empire Corporation

(Testimony of Michael Maffei.)

Mr. Scampini: I now offer in evidence on pages 127 and 128 of Volume 4 of the minute book which deal with the minutes of the executive committee meeting of Pacific Empire Holdings, Inc., in which it is reported the following members were present and acting, M. Maffei, L. R. Arnold, Peter Bercut, absent none, and ask you whether you observe at the end of the minutes I am showing you the signatures of L. R. Arnold and Peter Bercut.

A. Yes.

Q. Your signature is not there. A. No.

Q. Were you present, do you recall?

A. I don't remember that. [74]

Q. If the minutes recite that you were present you would not say that they were incorrect, would you? A. No.

Mr. Scampini: I desire to read into the record the following:

"M. Maffei, President, acted as chairman of the meeting, and L. R. Arnold acted as Secretary.

"The chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

"Upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

Resolved: That this corporation borrow from Joseph McInerney such sums of money from time to time as may be deemed necessary, not exceeding at any one time the total sum of Fifty

(Testimony of Michael Maffei.)

Thousand Dollars, and that as security for the repaying of such sum or sums, the President or the First Vice-President & Secretary, or the Treasurer are hereby authorized to execute in the name of and in behalf of this corporation such note or notes or other form of obligation, and such collateral or pledge agreements as may be required, and to pledge such assets of this corporation as may be required and agreed upon between such officers of this corporation and the said Joseph McInerney, and this corporation agrees to repay in currency of the Government of the United States, all amounts due or to become due from it to said Joseph McInerney.

“This authorization is to continue in full force and effect until revoked by a resolution of the Board of Directors of this corporation, and due notification of such resolution given to said Joseph McInerney.

“Upon motion duly made, seconded, and unanimously carried [75] the following resolution was adopted:

“Resolved: That the Agreement entered into by and between Pacific Empire Holdings, Incorporated and Joseph McInerney, dated April 24, 1936 be, and the same is hereby approved, the said Agreement to become a part of these minutes, herein referred to as Exhibit ‘A’, and be it

(Testimony of Michael Maffei.)

“Further Resolved: That the President and the Secretary be, and they are hereby directed to sign on behalf of the corporation, any other Agreements which may be necessary to carry out the purposes of the said Agreement hereinabove referred to.

“The President appointed Miss V. Picchi Assistant Secretary of the corporation, which appointment, by unanimous vote of all present, was ratified and approved.”

Q. Now, I show you, Mr. Maffei, what appears to be the original of Exhibit “A” found on pages 129 to 132 of the minute book, and referring to the agreement between the Pacific Empire Holdings, Inc., Merchants Ice & Cold Storage Company, and Joseph McInerney, dated April 24, 1936, and I will ask you to take a look at the original agreement and state whether or not you recall that contract.

A. I can remember the contract, but I can’t remember exactly what the money was used for at that time, whether it was used for Merchants Ice & Cold Storage Company, or what.

Mr. Scampini: I offer in evidence the agreement which is transcribed in the minute book as Exhibit “A”, and I assume the same stipulation may be made with respect to the agreement here that we made with respect to the last one, in other words, the minutes found on pages 129 to 132, inclusive, and the minutes may be deemed read into the record. [76]

(Testimony of Michael Maffei.)

Mr. Naus: And the original will be available?

Mr. Scampini: The original will be available to you at any time. Will it be so ordered, your Honor?

The Court: So ordered. It may be admitted and marked.

Mr. Scampini: In these minutes, Mr. Maffei, it is recited that the agreement Exhibit "A", referred to in the minutes, page 133—there is reflected an agreement dated the 24th of April 1936, between Pacific Empire Holdings, Inc., the Delaware corporation, first party, California Pacific Service, Inc., a California corporation, second party and Joseph McInerney, third party. I have not been able to find the original of that agreement, and I will ask the witness to look at the minutes and state whether or not he recognizes that transaction. Do you recall that, Mr. Maffei?

A. We had so many transactions that I do not recall; if it is in the minute book there is no point in asking me now.

Q. Did Pacific Empire Holdings, Inc. on or about April 24, 1936 have occasion to borrow the sum of \$18,000 from California Pacific Service, Inc., do you remember?

A. Not in one lump sum, because they did not have it.

Q. Did Pacific Empire Holdings, Inc., on or about April 24, 1936 find itself indebted to the Collector of Internal Revenue for a sum of money for taxes?

A. Right.

(Testimony of Michael Maffei.)

Q. How much, approximately, was that sum of money, do you recall?

A. I can't recall the amount.

Q. Did the Pacific Empire Holdings, Inc. find it necessary to obtain those funds?

A. We had to meet that assessment, we had to.

Q. Do you recall from whom the company borrowed the money for the purpose of paying the taxes?

A. I cannot recall whether it [77] was borrowed from an individual or from the bank.

Q. You have read this agreement, or a copy of the purported agreement which is found in the minute book which I have exhibited to you, and you do not recall that contract after your memory has been refreshed?

Mr. Naus: I object to the question as argumentative.

The Court: The objection is overruled. You may answer the question.

Mr. Scampini: Q. I will show it again to you, a copy of a purported agreement between Pacific Empire Holdings, Inc., first party, and California Pacific Service, Inc., second party, and Joseph McInerney, third party, dated April 24, 1936.

A. If that is in the minutes, that is correct.

Q. What was California Pacific Service, Inc.?

A. A laundry.

Q. Where was it? A. In Bakersfield.

Q. California Pacific Service, Inc. is a corporation? A. Right.

(Testimony of Michael Maffei.)

Q. A California corporation?

A. I think it is.

Q. And Pacific Empire Holdings, Inc. owned shares in that company? A. It did.

Q. How many shares, if you recall, did the holding company own?

A. I think about 96 per cent.

Q. Then was this laundry stock acquired by the Pacific Empire Holdings, Inc., if you remember?

A. I could not tell you exactly, I guess it was back quite a while.

Q. Do you know whether or not, Mr. Maffei, on January 8, 1941, Pacific Empire Holdings, Inc. retained or still owned this block of stock in the California Pacific Service, Inc., operating a laundry?

A. In 1941?

Q. January 8, 1941.

A. I think they only owned about one-half.

Q. To whom had the other half been sold or disposed of? [78] A. Joseph McInerney.

Q. Do you know whether or not, on or about December 31, 1940, and on January 8, 1941, Pacific Empire Holdings, Inc. was indebted to California Pacific Service, Inc.? A. They were.

Q. Do you recall or do you know whether it was quite a sum of money? A. I don't recall.

Q. Have you any recollection?

A. I have not.

Q. Do you know whether it was a small sum or a substantial sum?

(Testimony of Michael Maffei.)

A. It was a substantial sum.

Mr. Scampini: I now desire to read into the record the minutes of the special meeting of the executive committee held June 8, 1936, in which it is reported that M. Maffei, L. R. Arnold and Peter Bercut were present. It is found on pages 137 to 139 of Volume 4 of the minute books, and I will ask you whether or not you recognize the signatures of those three persons at the end of the minutes under the head of "Approved"? A. Yes.

Q. The minutes recite:

"M. Maffei, President, acted as chairman of the meeting, and L. R. Arnold acted as secretary.

"The chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

"Upon motion duly made, seconded and unanimously carried the following resolution was adopted:" (Reading)

What was the Globe Brewing Company?

A. A manufacturer of beer.

Q. Where is it located?

A. In San Francisco.

Q. The Pacific Empire Holdings, Inc. had a financial investment in Globe Brewing Company?

A. 50 per cent. interest.

Q. That investment, like other investments, proved to be an [79] unfortunate investment, is that right? A. Yes.

Q. Do you recall the reason why Pacific Empire

(Testimony of Michael Maffei.)

Holdings, Inc. made a 50 per cent investment in Globe Brewing Co.?

A. The Pacific Empire Holdings, Inc. was interested in the Merchants Ice & Cold Storage Co., and the Globe Brewing Company was a tenant and the holding company tried to save the Globe Brewing Company from going insolvent, and we put our money in it to keep it from doing so.

Q. Mr. Maffei, as I understand you, the Globe Brewing Company was a tenant of the Merchants Ice & Cold Storage Company? A. Yes.

Q. How much did that investment eventually cost, approximately?

A. Approximately, all told, about \$40,000.

Q. Do you know whether or not the Pacific Empire Holdings, Inc. under your management as president would have made the investment in the absence of the fact that Globe Brewing Company was a tenant of Merchants Ice & Cold Storage Company?

Mr. Naus: Objected to as immaterial, whether it would or not.

Mr. Scampini: The purpose of the question is to show the course of conduct in trying to build up the Merchants Ice & Cold Storage Company's business in making an investment in concerns which indirectly fed business into the Merchants Ice & Cold Storage Company.

The Court: The objection will be overruled.

Mr. Scampini: What is the answer?

A. It was building up assets for a tenant of the Merchants Ice & Cold Storage Company.

(Testimony of Michael Maffei.)

The Court: We will take a recess.

(Recess:) [80]

Mr. Scampini: Before I forget, I have not offered yet in evidence the agreement of April 24, 1936, which is the original agreement.

The Court: It may be admitted and marked.

(The document was marked "Plaintiff's Exhibit 9.")

PLAINTIFF'S EXHIBIT 9

AGREEMENT

Pacific Empire Holdings, Inc. and Merchants Ice and Cold Storage Company and Joseph McInerney.

This Agreement, made and entered into at San Francisco, this 24th day of April, 1936, between Pacific Empire Holdings, Inc., a Delaware corporation, hereinafter known as First Party, Merchants Ice and Cold Storage Company, a California corporation, hereinafter known as Second Party, and Joseph McInerney, hereinafter known as Third Party,

Witnesseth:

The parties hereto are contracting relative to the following facts:

On April 20th, 1936, Second Party was obligated to pay its taxes, due to the City and County Tax Collector of the City and County of San Francisco, in the approximate amount of Ninety-Six Hundred Dollars (\$9600.00). Second Party did not have suffi-

(Testimony of Michael Maffei.)

cient funds with which to meet and pay said taxes. First Party on said day was and now is the owner of a majority of the issued and outstanding common stock of said Second Party, and by virtue of said ownership, First Party on said day was and now is in control of the management of Second Party and did and still has a very substantial interest in the preservation of the solvency and financial integrity of Second Party.

By reason of said premises, First Party was desirous of enabling Second Party to meet, pay and discharge said obligation. First Party in order to obtain funds necessary to be advanced to Second Party for the purpose of enabling said Second Party to meet, pay and discharge its obligation, did thereupon borrow from Third Party the sum of Ten Thousand Dollars (\$10,000.00), and did thereupon loan and advance said sum to Second Party, and Second Party did use the proceeds of said loan with which to meet, pay and discharge its obligation, by paying its taxes on said date.

Now Therefore, in consideration of the premises and for the purpose of giving to said Third Party evidence of said indebtedness and for the purpose of securing the payment of said indebtedness to Third Party in accordance with said Memorandum of Agreement executed between First Party and Third Party at the time of delivery of said sum of Ten Thousand Dollars (\$10,000.00) by Third Party

(Testimony of Michael Maffei.)

to said First Party, the parties hereto do hereby agree with each other as follows, to-wit:

First Party does hereby agree to forthwith execute and deliver to Third Party its promissory note in the sum of Ten Thousand Dollars (\$10,000.00), due and payable as to principal six months from the 20th day of April, 1936, said note shall bear interest at the rate of Six Per Cent (6%) per annum, due and payable monthly. Said promissory note shall be endorsed on the back thereof, and guaranteed by Second Party as to payment.

In addition thereto, and for the purpose of securing payment of said promissory note according to its tenor, First Party does hereby agree to forthwith deliver to Third Party in pledge the following securities, which securities said First Party represents to Third Party that it owns free and clear, subject only to liens, hereinafter mentioned:

(a) Certificate numbered 89, representing Eleven Thousand Four Hundred Thirty-four (11434) shares of the common stock of Merchants Ice & Cold Storage Company;

(b) Certificate numbered 101, representing Three Hundred Twenty-six and Two-thirds ($326\frac{2}{3}$) shares of the common stock of Merchants Ice & Cold Storage Company;

(c) Certificate numbered 10, representing Nine Hundred (900) shares of preferred stock of Merchants Ice & Cold Storage Company. First Party represents to Third Party that it owns the afore-

(Testimony of Michael Maffei.)

mentioned shares of stock free and clear of any liens.

(d) An assignment executed by First Party to Third Party of all its respective right, title, interest and equity in and to each and all of the shares of stock represented by Certificate Number 7, representing Twenty-five Hundred (2500) shares, and Certificate Number 9, representing One Thousand (1000) shares of the preferred stock of Merchants Ice & Cold Storage Company, which are now held by the Delta Bank of Rio Vista as collateral for the payment of the sum of Two Thousand Dollars (\$2000.00), and upon the payment of said sum of Two Thousand Dollars (\$2000.00), said Delta Bank of Rio Vista shall be directed and authorized, and it is by these presents so directed and authorized to deliver all of said shares of said preferred stock of Merchants Ice & Cold Storage Company to Third Party herein, to be held by said Third Party pursuant to and in accordance with this pledge.

(e) An assignment executed by First Party of all their right, title, interest and equity in and to the following shares of stock:

(Testimony of Michael Maffei.)

Stock of Merchants Ice & Cold Storage Company

Certificate Number	Shares
90.....	4,838
109.....	1,000
108.....	1,000
107.....	1,000
106.....	1,000
105.....	1,000
104.....	1,000
103.....	1,000
102.....	1,000
75.....	893 $\frac{1}{3}$
88.....	6,838
45.....	5,133 $\frac{1}{3}$
87.....	11,170
6.....	3,990
96.....	71
92.....	1,600
94.....	6,976
93.....	2,893 $\frac{1}{3}$
132.....	1,531 $\frac{1}{3}$

Stock of Pacific National Bank of San Francisco

Certificate Number	Shares
A-218.....	50
A-216.....	100
A-215.....	100
A-217.....	100
A-187.....	421

said shares of stock now being on deposit with the Pacific National Bank of San Francisco as collateral security for a loan made by said bank to First Party in the sum of Fifty-Six Thousand Dollars (\$56,000.00), and for a loan made by said bank to Second Party in the sum of Ten Thousand

(Testimony of Michael Maffei.)

Dollars (\$10,000.00), the said Pacific National Bank of San Francisco shall be directed and authorized, and it is by these presents so directed and authorized to deliver all of said shares of stock to Third Party herein to be held by Third Party pursuant to and in accordance with this pledge.

It is further understood and agreed by and between the parties hereto that First Party shall not increase its indebtedness to the said Pacific National Bank of San Francisco in any sum in excess of the sum now due, owing and payable by First Party to said Pacific National Bank of San Francisco without the written consent of Third Party first had and obtained.

All of the parties hereto further agree that in the event First Party shall become and be in default in any of the payments of said promissory note, or any other of the terms, conditions and agreements herein set forth, Third Party may, if such default shall be continued for a period of Thirty (30) days, forthwith take such steps as he may deem necessary or advisable to foreclose any or all of the assets so pledged, and to sell any or the whole thereof, or any or all of the right, title, interest or claim of First Party therein, and shall apply the moneys received therefrom first to the payment of costs therein, including reasonable attorneys' fees, then to the payment of interest accrued and unpaid, and the balance to the reduction or discharge of the principal sum of said note.

(Testimony of Michael Maffei.)

First Party and Second Party waive the provisions of Section 3005 of the Civil Code of California relative to the manner of such pledges and agree that any such sales may be public or private, and upon such notice or notices to First Party as Third Party shall elect, and First Party further agrees to pay to Third Party whatever default may result after applying the net proceeds of such sale to the payment of said principal and interest thereon.

It is further agreed by and between the parties hereto that should any such foreclosure sale or sales be made, Third Party or his successors or assigns, directly or in the name of any other person, shall have the right to purchase any securities at such sale or sales.

In the event of any suit to enforce or defend any of the rights or claims of Third Party hereunder, First Party and Second Party agree to pay the costs and reasonable attorneys' fees therein, and that the amount thereof shall be secured by pledge or pledges herein provided. This memorandum is intended to express the agreement of the parties, and all of them agree to execute forthwith, and in the future, any and all instruments or other documents which Third Party may deem necessary advisable to affect its purposes.

This agreement shall be binding upon and shall inure to the benefit of the heirs, executors, adminis-

(Testimony of Michael Maffei.)

trators, successors and assigns of all the parties hereto.

In Witness Whereof, First Party has caused this agreement to be executed by its proper officers thereunto duly authorized and its corporate seal to be affixed, and Second Party has caused this agreement to be executed by its proper officers thereunto duly authorized, and its corporate seal to be affixed, and Third Party has subscribed his name the day and year and at the place first herein mentioned.

PACIFIC EMPIRE HOLDINGS, INC.

By M. MAFFEI

President

By L. R. ARNOLD

Secretary

First Party

[Seal]

MERCHANTS ICE AND COLD
STORAGE COMPANY

By WM. A. SHERMAN

President

By WALTER O. H. PLAGEMANN

Secretary

Second Party

[Seal]

JOSEPH McINERNEY
Third Party

Original also has
signature of

P. Empire Corporation

L.R.A.

(Testimony of Michael Maffei.)

Mr. Scampini: I desire to read into the record the minutes of the special meeting of the executive committee of the Pacific Empire Holdings, Inc., held on May 17, 1935, found at pages 64 and 65 of Volume 4 of the minute books, together with the exhibits thereto attached, Exhibits A and B on pages 66 to 69, inclusive, at which meeting it was reported were present M. Maffei, L. R. Arnold and Peter Bercut.

Q. I will ask you whether or not the signatures contained under the heading, "Approved", on page 65, are the signatures of the three gentlemen in question? A. They are.

Mr. Scampini: The minutes read as follows:

"M. Maffei, President, acted as chairman of the meeting, and L. R. Arnold acted as secretary.

"The chairman determined the existence of a quorum proper and sufficient to transact business and thereupon called the meeting to order.

"The President advised the committee that the meeting was called for the purpose of acting upon the result of negotiations now concluded between the officers of this corporation and the officers of Pacific Empire Corporation, whereby this corporation will grant to Pacific Empire Corporation an option to purchase all of the preferred and common shares of Merchants Ice & Cold Storage Company now owned by this corporation."

I will now show you, Mr. Maffei, what purports to be the original document, copies of which are

(Testimony of Michael Maffei.)

transcribed in the minute [81] book as Exhibits "A" and "B", pages 66 to 69, inclusive, in Volume 4 of the minute books, one document entitled, "Agreement between Pacific Empire Holdings, Inc., a Delaware corporation, and Pacific Empire Corporation, a California corporation," and will ask you to look at it and state whether or not the signatures appearing thereon are known to you and whether or not the contract was executed by the two companies. A. Yes.

Q. I will ask you to look at the pledge, Exhibit B in the minute book, which is entitled, "Assignment of way of pledge," and will ask you whether that assignment was executed by the two companies.

A. Yes.

Mr. Scampini: I will now offer in evidence in lieu of the originals as already stated photostatic copies of the agreement and pledge.

The Court: They may be admitted and marked.

(The agreement referred to was marked "Plaintiff's Exhibit 10" and the pledge referred to was marked "Plaintiff's Exhibit 11.")

PLAINTIFF'S EXHIBIT 10

AGREEMENT

This Agreement made and entered into by and between Pacific Empire Holdings, Inc., a Delaware corporation, hereinafter known as first party, and Pacific Empire Corporation, a California corporation, hereinafter known as second party,

(Testimony of Michael Maffei.)

Witnesseth:

Whereas, first *part* is now the owner of 49,944 $\frac{1}{3}$ shares of the common stock of Merchants Ice & Cold Storage Company, and of 3,990 shares of the preferred stock of said Merchants Ice & Cold Storage Company, all of which said shares of stock are held in pledge by Joseph McEnerney, as security for the payment to said Joseph McEnerney of a promissory note dated May 8, 1935, in the sum of Fifty Thousand (\$50,000) Dollars, payable on or before two years after date, executed jointly by first party and second party, which promissory note is further secured as to payment by additional collateral pledged with said Joseph McEnerney under an agreement executed jointly between said Joseph McEnerney and first party and second party herein, also bearing date of May 8, 1935, a copy of which agreement, promissory note and collateral pledge as security for the payment thereof, is hereto attached and made a part hereof by reference; and,

Whereas, the said number of shares of common and preferred stock of Merchants Ice & Cold Storage Company owned by first party represents the controlling interest of said corporation; and,

Whereas, second party is desirous of obtaining an option from first party for a period of three years from date hereof, within which to purchase all of said shares of Merchants Ice & Cold Storage Company hereinabove referred to, for the sum of \$484,000.00, payable in lawful money of the United

(Testimony of Michael Maffei.)

States on the exercise of the option, free and clear, however, of any liens or encumbrances; and,

Whereas, first party is willing to grant to second party such an option in consideration of the granting by second party to first party of the hereinafter mentioned accommodation.

Now, Therefore, in consideration of the premises, it is hereby mutually agreed as follows:

(1) Second party does hereby agree, as a consideration for the granting to it by first party of the option hereinafter referred to, to loan and advance from time to time to said first party the sum of Fifty Thousand (\$50,000) Dollars. Said advancement of Fifty Thousand (\$50,000) Dollars shall be made by second party to first party, as the needs of first party may require, and as the ability of second party to furnish said advancement may permit.

(2) It is hereby declared and admitted that on the date hereof second party has made an advancement and loan to first party on account of said Fifty Thousand (\$50,000) Dollar commitment above specified, the sum of \$38,800.00, and that there is on this day a balance due from second party to first party, under said above commitment, only the sum of \$11,200.00.

(3) First party does hereby agree to immediately execute and deliver under the seal of the corporation, to second party, its promissory note in the amount that the said advancements are made by sec-

(Testimony of Michael Maffei.)

ond party to first party from time to time, and in no event in excess of Fifty Thousand (\$50,000) Dollars, each of said promissory notes to be payable on or before five years from date hereof, with interest thereon at six (6%) per cent per annum, and each of said notes shall be secured by an assignment from first party to second party of all the right, title and interest of first party in and to each and all of said common and preferred shares of Merchants Ice & Cold Storage Company herein referred to, now on pledge with and subject to the pledge of said Joseph McEnerney. Interest on each of said notes given as evidence of said loan and advancement by second party to first party, shall be payable quarterly, and each of said notes shall have a principal acceleration clause in the event of failure to pay such interest when due.

(4) First party does hereby grant to second party an option to purchase, at any time within three years from date hereof, 49,944 $\frac{1}{3}$ shares of the common, and 3,990 shares of the preferred stock of Merchants Ice & Cold Storage Company, a California corporation, free and clear of any liens or encumbrances thereon, for the sum of \$484,000.00, payable in lawful money of the United States on the exercise of such option by second party. In the event of the exercise of said option by second party, in accordance with the terms hereof, any and all advancement or loan theretofore made by second

(Testimony of Michael Maffei.)

party to first party, in accordance with the foregoing commitment, and any and all other indebtedness or obligation owing by first party to second party at said time, shall be credited to said purchase price, and be considered as having been paid on account thereof.

(5) Second party does hereby admit and agree that the said promissory note, in the sum of Fifty Thousand (\$50,000) Dollars dated May 8, 1935, executed jointly between first party and second party to said Joseph McEnerney is the sole obligation of second party, and that second party will pay and discharge the same according to its tenor, holding and saving first party free and harmless from any and all liabilities or obligations thereunder, and that upon such payment and discharge of said note, there shall be returned to first party all of the collateral of every kind and character pledged by first party jointly with second party to said Joseph McEnerney, as security for the payment thereof. Second party does further agree to save and keep harmless Merchants Ice & Cold Storage Company from any and all obligation or liability created upon it by virtue of the endorsement and guarantee of payment executed by said Merchants Ice & Cold Storage Company, to said Joseph McEnerney as to said note.

In Witness Whereof the parties have hereunto set their hands, by their officers thereto properly

(Testimony of Michael Maffei.)
authorized by resolution of its board of directors,
this 15th day of May, 1935.

PACIFIC EMPIRE HOLDINGS, INC.,
a corporation,

By L. R. ARNOLD

1st Vice-President

By A. A. HEER, JR.

Treasurer

First Party

[Seal]

PACIFIC EMPIRE CORPORATION,
a corporation,

By M. MAFFEI

President

By A. A. HEER, JR.

Secretary

Second Party

[Seal]

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No.
22339R. Plfs. Ex. No. 10. Filed 4-20-43. Walter
B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

PLAINTIFF'S EXHIBIT 11

ASSIGNMENT BY WAY OF PLEDGE

Know All Men by These Presents:

That whereas Pacific Empire Holdings, Inc., a corporation, hereinafter known as First Party, and Pacific Empire Corporation, a California corporation, hereinafter known as Second Party, did, on

(Testimony of Michael Maffei.)

the 15th day of May, 1935, enter into an agreement, a copy of which agreement is hereto attached and made a part hereof by reference; and

Whereas, under and by virtue of said agreement First Party did agree to assign over and unto Second Party 49,944 $\frac{1}{3}$ number of shares of common stock, and 3,990 number of preferred stock, of Merchants Ice & Cold Storage Company, a California corporation, as security for the payment to said Pacific Empire Corporation of any and all indebtedness due or owing by First Party to Second Party under the said agreement and created by virtue of loans to be made pursuant thereto by Second Party to First Party;

Now Therefore, in consideration of the premises and as and for the purpose of securing the payment of any and all of such obligations incurred by First Party to Second Party, and for the purpose of paying, according to their respective tenors, any and all promissory notes or other evidences of indebtedness now owing, or hereafter to be incurred, by First Party, either pursuant to said agreement, or by reason of any other acts of borrowing by First Party from Second Party, or by reason of any assumption of any liability by First Party from Second Party, or for any other reason whatever, First Party does hereby assign, transfer and sell and set over unto Second Party 49,944 $\frac{1}{3}$ number of shares of the common stock, and 3,990 number of shares of preferred stock of Merchants Ice & Cold Storage Company, a corporation, represented by the certificates

(Testimony of Michael Maffei.)

of stock described on the hereto attached Exhibit "A", all of which said shares of stock and certificates are now on pledge with Joseph McInerney as security, together with other collateral, for the payment to said Joseph McInerney of a promissory note in the sum of Fifty Thousand (\$50,000.00) Dollars, dated May 8, 1935, executed jointly to said Joseph McInerney by First Party and Second Party herein;

This assignment by way of pledge is executed specifically subject to the lien created by said pledge to said Joseph McInerney, and Second Party does hereby accept the assignment, transfer and sale of said shares, as security for the payment of the indebtedness hereinabove referred to, subject to the lien created in favor of said Joseph McInerney by said pledge agreement, and does further admit and declare that the said promissory note in the sum of Fifty Thousand (\$50,000.00) Dollars, executed jointly between the First Party and Second Party to said Joseph McInerney, is the primary and sole obligation of Second Party herein, and said promissory note is to be paid according to its tenor by Second Party herein, and any and all collateral pledged with said Joseph McInerney by First Party herein, as security for the payment of said promissary note, is the sole and absolute property of First Party and is to be returned to First Party free and clear of any claims on the part of said

(Testimony of Michael Maffei.)

Joseph McInerney arising out of said promissory note for which the same are held as security.

In Witness Whereof, the parties hereto have hereunto set their hands this 15th day of May, 1935, by their officers thereunto properly authorized by a resolution of their respective board of directors.

PACIFIC EMPIRE HOLDINGS, INC.,
a Delaware corporation,

By L. R. ARNOLD

1st Vice-President

By A. A. HEER, JR.

Treasurer

[Seal]

PACIFIC EMPIRE CORPORATION,
a corporation,

By M. MAFFEI

President

By A. A. HEER, JR.

Secretary

[Seal]

Mr. Scampini: I will now read from the minutes of quarterly meeting of the board of directors of Pacific Empire Holdings, Inc. found on pages 141 and 142, inclusive, pursuant to waiver of notice of quarterly meeting of the board, dated July 15, 1936, which appears to be signed by all the directors.

Q. Do you recognize the signatures of yourself and Mr. Arnold? A. Yes.

(Testimony of Michael Maffei.)

Q. It reads as follows:

“The regular quarterly meeting of the Board of Directors of Pacific Empire Holdings, Incorporated was held at the office of the company, 26 O’Farrell Street, San Francisco, California, on Wednesday, the 15th day of July, 1936, at the hour of 10:00 o’clock [82] a. m., pursuant to waiver of notice of said meeting preceding these minutes and made a part hereof.

“The President made a general report to the directors upon the condition of the company, and upon its other investments and operating units, and discussed at length the program being worked out by the Merchants Ice & Cold Storage Company with its bondholders, for the purpose of obtaining from them a five-year waiver of the sinking fund requirements, in order that the Merchants Ice & Cold Storage Company could have sufficient relief from a cash standpoint to enable it to retire its obligations, including amounts owing to this corporation and Pacific Empire Corporation.

“The President also presented to the Board of Directors for approval, the agreement entered into on April 23, 1936, between this corporation, Merchants Ice & Cold Storage Company, L. Sozzi and A. J. Scampini, in connection with the purchase of a 50 per cent interest in the Globe Brewing Company. Upon full and complete discussion of the matter and such benefits as should accrue to the corporation through the acquisition of an interest

(Testimony of Michael Maffei.)

in an additional operating unit, by motion duly made, seconded and unanimously carried, the following resolution was adopted:

“Resolved: That the action of the President and the Secretary in signing on behalf of the corporation, the agreement entered into on the 23rd day of April, 1936, by and between Pacific Empire Holdings, Incorporated, Merchants Ice & Cold Storage Company, L. Sozzi and A. J. Scampini, he ratified and approved, the said agreement to become a part of these minutes, herein referred to as Exhibit ‘A’.

The President advised the Board of Directors of the offer [83] which had been received from the Bank of America to purchase from this corporation, all the stock owned in the Delta Bank of Rio Vista. Upon motion duly made, seconded and unanimously carried, it was

“Resolved: That the Executive Committee be, and they are hereby authorized to act upon any offer which may be made to the corporation for the purchase of all of the shares of stock of Delta Bank of Rio Vista, in accordance with their best judgment.

“A certain discussion took place concerning the holding of the annual meetings of the stockholders.”

Q. You testified this morning in answer to a question of mine substantially to the effect when I asked you who managed the affairs of the company,

(Testimony of Michael Maffei.)

you testified that you and Mr. Arnold managed them. A. Right.

Q. Was it the custom of the company to call meetings of the executive committee when any matter of any importance came up for approval or rejection or decision?

Mr. Naus: One moment. Objected to as calling for the witness' conclusion.

The Court: Develop the facts, whatever they are.

Mr. Scampini: Q. Whenever any matter like the acquisition of any property involved any substantial sum of money, what would you do in connection with determining whether or not the investment should be made?

A. In which way, you mean selling or buying?

Q. Let us take buying, first.

A. We would buy whatever we wanted to buy and hold an executive meeting to pass upon it.

Q. If the executive committee passed upon it what would your next action be?

A. The next day we would hold a meeting of the board. [84]

Q. How often did you hold your meetings of the board?

A. Sometimes we would hold them three times a year or twice a year. The minute book will show you exactly.

Q. Whenever a meeting of the board was held would you present to the board the actions and con-

(Testimony of Michael Maffei.)

duct of the executive committee which had been ordered or approved prior to the holding of the meeting?

A. We would have the board pass upon whatever happened between that time.

Q. Whenever you had a deal for the disposition of property of the company, such as, for example, the Bank of Rio Vista, what would you do?

A. Well, we did not hold any meeting before we sold it.

Q. What would you do?

A. We would do the selling.

Q. I notice in the minutes that the corporation authorized the executive committee to act upon any offer which might be made to the corporation for these shares of stock.

A. The executive committee had the power.

Q. Would the board pass upon the action of the executive committee either before or after?

A. Well, the board gave the power to the executive committee to act, and naturally after the sale was made it was up to the board to pass upon it.

Q. You would then present it to the board in a subsequent meeting, is that correct? A. Yes.

Q. I now desire to read into the record the minutes of the special meeting of the board of directors of Pacific Empire Holdings, Inc., dated March 10, 1937, pursuant to a waiver of notice, found on pages 181, et seq. of Volume 4, and ask you whether you recognize the signatures appearing on the

(Testimony of Michael Maffei.)

waiver of notice. A. They all appear there.

Q. Peter Bercut does not appear? A. No.
[85]

Q. The minutes recite that Peter Bercut was absent. A. That is correct.

Q. The minutes read as follows:

“The following directors were present and acting: M. Maffei, L. R. Arnold, A. A. Heer, T. M. Ryerson, Luigi Giachini, James Bernardini. The following director was absent, Peter Bercut.

“M. Maffei acted as chairman of the meeting and L. R. Arnold acted as secretary.

“The chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

“The Secretary read the minutes of the quarterly meeting of the Board of Directors held on the 15th day of January, 1937, which upon motion duly made, seconded and unanimously carried, were approved as read.

“The meeting thereupon proceeded to the election of officers, thereupon the following names were proposed for the respective officers shown: M. Maffei, President, L. R. Arnold, First Vice-President and Secretary, Peter Bercut, Second Vice-President, A. A. Heer, Jr., Treasurer and Assistant Secretary.”

These pages are no longer numbered, Mr. Naus, but it is part of the minutes and read as follows:

“The First Vice-President presented the pro-

(Testimony of Michael Maffei.)

posed report of the management, and consolidated balance sheet of the corporation as of December 31, 1936, to be mailed in printed form to the stockholders. Thereupon, by motion duly made and seconded, the consolidated balance sheet and supporting schedule, together with a proposed report, was unanimously approved, and the Secretary was instructed to prepare the said report and balance sheet in final form and mail a copy of the said report and [86] balance sheet to each stockholder of record, the said report and balance sheet herein referred to as Exhibit 'A'."

I will now show you, Mr. Maffei, what purports to be the report to the stockholders under date of April 1, 1937, addressed to the Stockholders of Pacific Empire Holdings, Inc., which appears to be by order of the Board of Directors, Mr. Maffei. Do you recognize it? A. Yes.

Q. Was this report mailed to the stockholders?

A. It must have been mailed.

Q. I notice over here that the common stock of the Merchants Ice & Cold Storage Company is carried at \$513,207.07. A. That is right.

Q. And that the preferred stock is carried at \$48,490. A. Yes.

Q. Which represents a substantial increase from the previous report. During the interval did the company acquire any more shares in the Merchants Ice & Cold Storage Company?

A. They must have acquired more.

(Testimony of Michael Maffei.)

Q. Do you recall the transaction wherein and whereby you bought 700 shares of preferred stock from Mr. Roussell? A. Yes.

Q. Was he a director of the Merchants Ice & Cold Storage Company? A. Yes.

Q. Do you recall the price you paid for that stock? A. I think we paid par.

Q. \$10, 700 shares at \$10 would be \$7000?

A. Yes.

Q. I notice on the last page of the stockholders' report you say to the stockholders as follows: "Your Board of Directors wishes also to advise you, that during the year 1936 definite progress has been made by the management, in the consolidation and funding of the balance owing by the corporation on notes and accounts resulting directly from obligations previously contracted on [87] account of claims settled by the present management. Other than secured bank loans, the corporation has the ability to pay and discharge its obligations, in accordance with their tenure, without the liquidation of any of its major holdings, as listed in the accompanying balance sheet. In this connection, therefore, your Board of Directors wishes to report upon the sale of the stock owned by the corporation in the Delta Bank of Rio Vista, Rio Vista, California, which sale represents the final step to be taken in the liquidation of assets, believed to be unprofitable, in accordance with the policy previously adopted by the management. In this instance, the

(Testimony of Michael Maffei.)

proceeds therefrom were used toward the further reduction of obligations, and for the purpose of reinvestment. All steps which have been taken by your Board of Directors, during its supervision of the affairs of the corporation, have been in keeping with a definite plan for the development of the resources of the corporation for the benefit of its stockholders. Throughout this period, no unnecessary expenditures have been permitted, and administrative expense and salaries have been maintained at the minimum previously established, and no increase in such expenditures is contemplated or will be authorized."

You also say to your stockholders the following:

"Included also, in the investment of your corporation, as set forth in the accompanying balance sheet, is an amount representing a 50 per cent interest in the capital stock of Globe Brewing Company, acquired by your corporation at an extremely fair figure in proportion to its intrinsic value. The management wishes to point out, that while this acquisition represents an additional asset, it is not to be considered as an additional cash outlay of an expansion program. Your board of directors [88] desires to advise you that by virtue of inter-company claims existing by and between your corporation, Merchants Ice & Cold Storage Company, and Globe Brewing Company, the management of your corporation was able to sponsor and promote a general plan of reorganization of Globe Brewing Com-

(Testimony of Michael Maffei.)

pany, whereby, your corporation, for a limited investment, was able to acquire the stock interest in Globe Brewing Company, representing working control. Further, inasmuch as Globe Brewing Company is a tenant of Merchants Ice & Cold Storage Company, under lease and refrigeration contracts, its operation is essential and profitable to Merchants Ice & Cold Storage Company. In sponsoring the reorganization of the Globe Brewing Company, the conclusions of the management were based upon a thorough appraisal of the plant, machinery and equipment, representing one of the most modern in brewery installation, costing approximately \$240,000, and its belief in the present records of manufacture, output and distribution since relegalization. Future value and profits which may be realized by your corporation upon this investment cannot be estimated, nevertheless it is the opinion of the management that it should prove profitable, when the plans of the management of Globe Brewing Company have fully materialized."

Now, when you made those statements to your stockholders you actually believed them in good faith, didn't you? A. That is right.

Q. You believed them to be true? A. Yes.

Q. You had no reason to doubt the veracity of that statement? A. No.

Q. You also stated to your stockholders the following:

"Resulting from the efforts of the management,

(Testimony of Michael Maffei.)

in coopera- [89] tion with the management of Merchants Ice & Cold Storage Company, a plan of reorganization was worked out with the complete accord of interested banks, investment bankers, and creditors, and submitted with the approval of the Railroad Commission of the State of California, to the holders of mortgage bonds of that company. At this date, the management is pleased to report that the plan of reorganization of Merchants Ice & Cold Storage Company has received the full support and approval of its stockholders, bankers and creditors; and of its bondholders representing approximately 80 per cent of its outstanding first mortgage bonds. Thus, the successful conclusion of the efforts of the board of directors to place the largest investment of your corporation in a sound financial position, is assured. Greater earning power, which should be realized by Merchants Ice & Cold Storage Company, directly attributable to the constructive features included in the plan of reorganization, combined with its continuously increasing volume of business, should ultimately result in greater earnings and appreciation in the value of its stock, and finally the increase in the value of the holdings of your corporation."

· You actually believed that statement to represent the fair and true value of that business: is that correct? A. Correct.

Q. It is true, is it not, that the Merchants Ice & Cold Storage Company had just immediately prior

(Testimony of Michael Maffei.)

to its annual report filed in this court under 77(b) a plan of reorganization? A. Right.

Q. Wherein and whereby the bond indenture was modified so as to provide for a five-year postponement of the principal maturity under the bond?

A. That is right.

Q. That had been approved, as you stated, by the creditors, the banks and bondholders? A. Yes.

Q. And the court had also approved it, is that right? A. Yes. [90]

Q. You felt that that reorganization had improved substantially the financial condition of the company? A. That is true.

Q. Is it true or is it not true that as a result of that reorganization Merchants Ice & Cold Storage Company was in a much more healthy financial condition in 1937 than in 1936?

A. Naturally it was.

Q. I am now reading from page 2, Volume 5, of the minute book which deals with the minutes of special meeting of the Board of Directors of Pacific Empire Holdings, Incorporated, dated June 15, 1937. I will ask you whether or not you note Peter Bercut's signature on page 1, which is a waiver of notice? A. Correct.

Q. And the other directors are present except one? A. That is right.

Q. Now, the minutes read as follows:

"M. Maffei acted as Chairman of the meeting, and L. R. Arnold acted as Secretary.

(Testimony of Michael Maffei.)

“The Chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

“The Secretary read the minutes of the Special Meeting of the Board of Directors held on the 10th day of March, 1937, together with the minutes of the Executive Committee Meetings held on March 10th and 25th, respectively, which upon motion duly made, seconded, and unanimously carried, were approved as read.

“The First Vice-President reported upon the successful conclusion of the Reorganization of Merchants Ice & Cold Storage Company and presented the operating report as of April 30, 1937, and the Audit Report of Messrs. Haskins & Sells, as of the close of business, December 31, 1936, which by motion duly made, seconded [91] and unanimously carried, were ordered filed.

“The President made a report upon the business and the present condition of the Globe Brewing Company and presented a statement as of April 30, 1937, which statement was ordered to be included as a part of these minutes herein referred to as Exhibit ‘A’.

“The First Vice-President made a general report upon the condition and business of the California Pacific Service Company and presented a statement showing the operations of the Family Service Laundry at Bakersfield, and the condition of the company at the close of business, April 30th, 1937.

(Testimony of Michael Maffei.)

“Upon the conclusion of a general discussion concerning the present and future value of these companies, by motion duly made, seconded, and unanimously carried, the Secretary was instructed to include a copy of the Balance Sheet, and the Profit and Loss Statements in these minutes, herein referred to as Exhibit ‘B’.

“In the next order of business a general discussion ensued and the President and First Vice-President reported upon steps being taken and the progress made to date toward consolidating and funding the bank loans of the corporation and obligations owing to Joseph McInerney, etc., over a long term. Thereupon, by motion duly made, seconded, and unanimously carried, the President, Vice-President and Secretary were authorized to execute on behalf of the corporation, such notes or documents as may be necessary in connection with the consolidation of the obligations now owing by the corporation, in the event that the steps now being taken by the management should be successfully concluded.”

Now, at this meeting, which was not any different from the rest of the meetings, you were presenting to the board all of the [92] activities of your company and its subsidiaries? A. Yes.

Q. And at that time you were communicating, were you not, with the Pacific National Bank looking toward the refunding of the obligations of the Pacific Empire Holdings, Inc. and Pacific Empire Corporation, were you not? A. Yes.

(Testimony of Michael Maffei.)

Q. I now show you what appears to be an agreement dated September 1, 1937, by and between Pacific Empire Corporation and Pacific Empire Holdings, Inc., and Pacific National Bank of San Francisco, and ask you whether or not those are the parties who executed the agreement, and do you recall it? A. Yes, I recall it.

Q. In the execution of this agreement, you were acting pursuant to the authorizations which were given to you by the minutes of this board?

A. Yes.

Mr. Scampini: I ask that this be marked as our exhibit next in order.

(The document referred to was marked "Plaintiff's Exhibit 12.")

PLAINTIFF'S EXHIBIT No. 12

AGREEMENT

Between Pacific Empire Corporation and Pacific Empire Holdings, Inc. and Pacific National Bank of San Francisco

Dated: September 1st, 1937

This Agreement, executed this 1st day of September, 1937, by and between Pacific Empire Corporation, a corporation, and Pacific Empire Holdings, Inc., a corporation, hereinafter called "Corporations," and Pacific National Bank of San Francisco, a national banking association, hereinafter called "Bank,"—

(Testimony of Michael Maffei.)

Witnesseth:

Whereas, the Corporations are now indebted to the Bank in the sum of Fifty-six thousand (\$56,000.00) Dollars for monies loaned and evidenced by the promissory notes of the Corporations, and

Whereas, the parties desire to maintain and continue said loan for a period of three (3) years from and after the date hereof, said indebtedness to bear interest at the going rate for commercial loans, and

Whereas, Merchants Ice and Cold Storage Company is now indebted to said Bank in the sum of Twenty-four thousand, six hundred ninety and 72/100 (\$24,690.72) Dollars, evidenced by its promissory notes,—

Now, Therefore, in consideration of the premises, it is hereby mutually agreed as follows:

1. That the indebtedness owing from the Corporations to the Bank in the sum of Fifty-six thousand (\$56,000.00) Dollars shall be carried for a period of three (3) years from the date hereof, and during said period of time the Corporation shall continue to borrow, and the Bank shall continue to loan, said sum at the going rate of interest for commercial loans, provided that the Bank shall be privileged to call said loan and demand payment thereof in the event of default in payment of interest in accordance with the terms of the note or notes evidencing the indebtedness, and such default shall continue for a period of thirty (30) days, it being understood that said indebtedness shall be evidenced during

(Testimony of Michael Maffei.)

said period of time by the existing note or by renewal notes which shall be executed by the Corporations at any time upon request by the Bank.

2. The Corporations do hereby agree to pay or cause to be paid to the Bank on or before December 31st, 1937, the indebtedness of the Merchants Ice and Cold Storage Company amounting to Twenty-four thousand, six hundred ninety and 72/100 (\$24,690.72) Dollars, hereby assuming the obligations of said Merchants Ice and Cold Storage Company, in accordance with the terms of the notes or other evidences of said indebtedness, except as to date within which payment shall be made, to-wit: December 31st, 1937.

In Witness Whereof, the parties have caused these presents to be executed the day and year first hereinbefore written, by their officers thereunto duly authorized.

PACIFIC EMPIRE CORPORATION,
a corporation,

By M. MAFFEI

Its

By A. A. HEER JR.

Its

[Seal]

PACIFIC EMPIRE HOLDINGS, INC.,
a corporation,

By M. MAFFEI

Its

By L. R. ARNOLD

Its

(Testimony of Michael Maffei.)

[Seal]

PACIFIC NATIONAL BANK OF
SAN FRANCISCO, a national bank-
ing association,

By H. R. GAITHER

Its President

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No.
22339R. Plfs. Ex. No. 12. Filed 4-20-43. Walter B.
Maling, Clerk. By J. P. Welsh, Deputy Clerk.

The agreement, among other things, provides as follows:

“Whereas the corporations are now indebted to the bank in the sum of \$56,000 for monies loaned and evidenced by the promissory notes of the corporations, and

“Whereas, the parties desire to maintain and continue said loan for a period of three years from and after the date hereof, said indebtedness to bear interest at the going rate for commercial loan, and

“Whereas, Merchants Ice & Cold Storage Company is now indebted to said Bank in the sum of Twenty-four thousand, six hundred ninety and 72/100 (\$24,690.72) Dollars, evidenced by its promissory notes,—

“Now, Therefore, in consideration of the premises, it is hereby mutually agreed as follows: [93]

“1. That the indebtedness owing from the Corporations to the Bank in the sum of Fifty-six thou-

(Testimony of Michael Maffei.)

sand (\$56,000.00) Dollars shall be carried for a period of three (3) years from the date hereof, and during said period of time the Corporations shall continue to borrow, and the Bank shall continue to loan, said sum at the going rate of interest for commercial loans, provided that the Bank shall be privileged to call said loan and demand payment thereof in the event of default in payment of interest in accordance with the terms of the note or notes evidencing the indebtedness, and such default shall continue for a period of thirty (30) days, it being understood that said indebtedness shall be evidenced during said period of time by the existing note or by renewal notes which shall be executed by the Corporations at any time upon request by the Bank.

“2. The Corporations do hereby agree to pay or cause to be paid to the Bank on or before December 31st, 1937, the indebtedness of the Merchants Ice & Cold Storage Company amounting to Twenty-four thousand, six hundred ninety and $72/100$ (\$24,690.72) Dollars, hereby assuming the obligations of said Merchants Ice & Cold Storage Company, in accordance with the terms of the notes or other evidences of said indebtedness, except as to date within which payment shall be made, to-wit: December 31st, 1937.”

Do you recall whether or not this contract was executed and carried out?

Mr. Naus: You mean giving the three years' time to the Pacific Empire Corporation and Pacific Empire Holdings, Inc.?

(Testimony of Michael Maffei.)

Mr. Scampini: That is right.

A. Yes, that contract was.

Q. You assumed by virtue of that contract the \$24,000 debt of the [94] Merchants Ice & Cold Storage Company: is that right? A. Yes.

Q. Now, I wish to read into the record the minutes of the executive committee meeting of Pacific Empire Holdings, Inc. held July 22, 1937, found at page 4, et seq. of Volume 5:

“The following members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut. Absent—None.”

The three signatures at the end of the meeting are theirs? A. They are.

Q. I desire to read into the record the following from the minutes:

“The President advised the Committee that the meeting was called for the purpose of considering and acting upon the matter relating to the guaranty by this corporation for the payment of a \$10,000.00 note to be executed by Merchants Ice & Cold Storage Company on behalf of the Anglo California National Bank of San Francisco matter, necessary to assist Merchants Ice & Cold Storage Company in paying part of its Reorganization expenses.”

Do you recall the transaction, Mr. Maffei, in which the Merchants Ice & Cold Storage Company was compelled to borrow \$10,000 from the Anglo California Bank of San Francisco to meet the expenses of the 77(b) proceeding?

A. I do not recall, but if it is in the minutes it must be O.K.

(Testimony of Michael Maffei.)

Q. You don't recall it, yourself? A. No.

Q. Do you recall guaranteeing the note of \$10,000 at the Anglo California National Bank?

A. I don't recall that.

Mr. Naus: They borrowed \$10,000 to pay for reorganization expense and it was guaranteed by the Pacific Empire Holdings, Inc. and Pacific Empire Corporation. In other words, it cost \$10,000 to put that reorganization through and your counsel fee was in that \$10,000. [95]

Mr. Scampini: We were allowed \$6000 fee in the case, which I think was fair compensation, and I still think it was a good reorganization.

Q. At that time Mr. Scampini was one of the directors of the Merchants Ice & Cold Storage Company? A. I think so.

Q. That is, prior to that, but he had also been a director of the Empire Pacific Corporation, and Mr. Scampini resigned as a director and counsel of the Merchants Ice & Cold Storage Company and Pacific Empire Corporation sometime in the year 1936? A. Right.

Q. Do you recall the circumstances under which he resigned? A. Right.

Q. What were the circumstances?

Mr. Naus: One moment. Wasn't the resignation in writing?

Mr. Scampini: In the form of a letter. It is a part of the minutes.

Mr. Naus: Why not put the letter in?

(Testimony of Michael Maffei.)

Mr. Scampini: I will be glad to put it in the record right now. Will it be stipulated that the minute book of the Pacific Empire Corporation is admitted in evidence?

Mr. Naus: No, not in evidence, let it be marked for identification.

(The minute book was marked "Plaintiff's Exhibit 13 for Identification.")

Mr. Scampini: This is Volume 1.

Q. I now ask you whether or not you recall a meeting of the Board of Directors of Pacific Empire Corporation, held Friday, September 25, 1936, at which the following directors were present and acting: M. Maffei, A. A. Heer, L. R. Arnold, Peter Bercut, and the following director was absent: A. J. Scampini? [96] A. Correct.

Q. It is recited in these minutes, may it please the Court, as follows——

Mr. Naus: Are these pages numbered?

Mr. Scampini: No, they are not numbered. Some are and some are not.

Mr. Naus: I was wondering whether the number appeared on what you are about to read.

Mr. Scampini: No, it is not numbered. It reads as follows:

"The Secretary read the minutes of the Regular Quarterly Meeting of the Board of Directors held on the 26th day of June, 1936, which by motion duly made and seconded, were unanimously approved as read.

(Testimony of Michael Maffei.)

“The President made a general report to the Board of Directors concerning the present condition of Pacific National Bank, and the increased value to the block of stock in that bank, owned by this corporation, and advised the Board that in his opinion and in the opinion of the present management of Pacific National Bank its condition will continue to improve, likewise the value of its stock; the stock at the present time paying six per cent dividend annually, with the possibility of a special dividend at the end of the current year.

“The President also reported to the Board upon the progress made in connection with the reorganization of Merchants Ice & Cold Storage Company, and gave his assurance that the plans now being carried on by the management of the parent company with various interested parties, including the E. H. Rollins & Sons and Stephenson-Leydecker & Co., underwriting firms, and the interested banks, their full cooperation was assured. The final consummation of this reorganization would ultimately place Mer- [97] chants Ice & Cold Storage Company in position to pay its obligations owing to this corporation.

“The written resignation as a Director and Counsel for the corporation, submitted by A. J. Scampini, was presented by the Secretary. In commenting upon the resignation of Mr. Scampini, the President observed that it was regrettable that the difference in opinion as to policy, which Mr. Scam-

(Testimony of Michael Maffei.)

pini apparently believed prevailed, was such that he deemed it advisable to no longer act as a Director or as counsel for the corporation, inasmuch as the formation of the corporation and its policies were thoroughly worked out with Mr. Scampini, both as Director and Counsel, it being the opinion that all steps taken were for the best interests of the corporation and its stockholders.

“Thereupon, by motion duly made, seconded, and unanimously carried, it was resolved that the resignation of Mr. A. J. Scampini as Director and Counsel be accepted with regrets. The Secretary was instructed to include the written resignation of Mr. Scampini dated August 17, 1936, as a part of these minutes, herein referred to as Exhibit ‘A’.”

There is attached the original letter, is there not, from Mr. Scampini? A. That is right.

Q. And it reads as follows. It is addressed to Pacific Empire Corporation, 26 O’Farrell Street, San Francisco, California. It is dated August 17, 1936, on the letterhead of Hettman & Scampini:

“You may consider this as my resignation as a Director and counsel for Pacific Empire Corporation.

“I have been constrained to make this decision, because of the fundamental differences of opinion prevailing between me and the management concerning the policies and conduct of the [98] company’s business, which leads me to the conclusion that for the best interests of the company I should

(Testimony of Michael Maffei.)

disassociate myself with it to the end that any responsibility attaching to and arising out of the management of the business of the company shall rest on the proper persons. I must observe, however, that since the formation of this company not a single directors' meeting has ever been held, and all decisions made by the management involving the company's properties have been made solely on the responsibility of its officers, without any ratification whatever on the part of its Board of Directors.

"I, therefore, must disclaim any responsibility whatever for any matter or thing done by the management in the premises.

"My office has been acting as counsel for the company since its organization, and in view of the fact that no settlement has ever been made with me looking towards the fixing of any compensation for any services so far, I suggest that you designate one of your officers to meet with me in an effort to arrive at an amicable settlement in that connection."

Q. Now, Mr. Maffei, at the time that this letter was received there were some differences of opinion between you and Mr. Arnold and I regarding policies, weren't there? A. That is right.

Q. There was not any ill feeling between us, was there? A. No.

Q. There has never been, as far as you know, has there? A. No.

(Testimony of Michael Maffei.)

Q. You had no trouble whatsoever in coming to an agreement with me as to the amount of my compensation, did you? A. Not at all.

Q. As a matter of fact, there was also disagreement between us with regard to the management of Merchants Ice & Cold Storage Company?

A. That is right.

Q. There were several things there that Mr. Sherman was doing [99] there that I did not approve of, isn't that right?

A. That is right.

Q. And I used to state my objections at the meeting of the board? A. Yes.

Q. And resigned from that board?

A. Yes.

Q. I was never an officer or director of Empire Pacific Holdings, Inc.? A. No.

Q. I was acting as counsel during those years?

A. Yes.

Q. And when this settlement was made my association with the holding company and all of its subsidiaries then ceased, is that right?

A. That is correct.

Q. I was never an officer or director of the holding company? A. No.

Q. Now, as part of the settlement which you made with regard to compensation due me for the work that I had done, you made a cash payment, did you not? A. Correct.

Q. You also executed a promissory note for I think \$5000? A. Whatever the amount was.

(Testimony of Michael Maffei.)

Q. As a matter of fact, on that promissory note from time to time something was paid on account, is that right? A. Correct.

Q. Did you ever get any demand from me to pay me any of it? A. No.

Q. As a matter of fact, there is still some owing today? A. There is.

Q. Did Mr. Scampini ever bother you about it?

A. No.

Q. But every once in a while he would call you up and ask why it was not paid?

A. Yes.

Q. He called you up after the deal with the Merchants Ice & Cold Storage Company was made?

A. Yes.

The Court: We will take an adjournment now until tomorrow [100] morning at ten o'clock.

(An adjournment was thereupon taken until tomorrow, Wednesday, April 21, 1943, at 10:00 o'clock a. m.) [101]

Wednesday, April 21, 1943—10:00 o'clock A. M.

MICHAEL MAFFEI,

recalled; Direct Examination (resumed):

Mr. Scampini: I am now reading into the record, may it please the Court, the minutes of the special meeting of the board of directors of Pacific

(Testimony of Michael Maffei.)

Empire Holdings, Inc., held February 11, 1938, found at pages 12 and 14 of Volume 5 of the minute books, at which it was reported the following directors were present and acting: M. Maffei, L. R. Arnold, A. A. Heer, Luigi Giachini, James Bernardini and Peter Bercut. The following director was absent: T. M. Ryerson.

“The chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

“The secretary read the minutes of the Special Meeting of the Board of Directors held on the 15th day of June, 1937, together with the minutes of the Executive Committee Meetings held on the 22nd day of July, 1937 and the 16th day of September, 1937, respectively, which upon motion duly made, seconded and unanimously carried were approved as read.

“The President made a general report upon the condition of the company and submitted the balance sheet of California Pacific Service Company, and the balance sheet and statement of profit and loss of Merchants Ice & Cold Storage Company. After a general discussion participated in by all members present, upon motion duly made, seconded and unanimously carried, the balance sheet and statement of profit and loss were accepted, to become a part of these minutes herein [104] referred to as Exhibits ‘A’ and ‘B’.

(Testimony of Michael Maffei.)

“The First Vice-President presented for approval, the memorandum of agreement entered into between this corporation and Joseph McInernery, which covered the sale of the corporation’s interest in Assured Thrift, Inc.”

Q. What was Assured Thrift, Inc.?

A. That was an insurance agent.

Q. Operated in Los Angeles, is that right?

A. No, it was being operated here; the one in Los Angeles was a different corporation.

Q. Did you own it completely? A. Yes.

Q. 100 per cent ownership? A. Yes.

Q. The corporation? A. Yes.

Q. How long had Pacific Empire Holdings, Inc. owned it?

A. We took that over from the Brotherhood.

Q. From the Brotherhood Investment Corporation?

A. From the Brotherhood Investment Company.

Q. What did you agree to sell that for to Mr. McInerney, for what price, do you know?

A. I don’t know. I think we owed Mr. McInerney about in the neighborhood of \$13,000, and we gave him that stock for that amount of money which we owed him.

Q. What necessity or what financial condition prompted you to dispose of this company—what financial requirements induced you to dispose of this company?

(Testimony of Michael Maffei.)

A. Well, there was no other way to pay McInerney off.

Q. I notice that it says here, "The First Vice-President stated that the reasons for this transaction was to reduce the company's obligations to Joseph McInerney based upon the original agreement now in force, and to secure an additional amount necessary to be loaned to Merchants Ice & Cold Storage Company to assist it in meeting its heavy commitments coming due in April, for bond [105] interest and taxes."

Does that bring to your mind the condition or the inducement which prompted you to dispose of this property?

A. The main thing was to dispose of it and reduce our indebtedness.

Q. You deemed it advisable to discuss disposition of this company with the Board of Directors before this transaction?

A. If it is in the minutes we must have.

Mr. Scampini: I will now read into the record the annual stockholders' meeting of the company, held in the City of Wilmington, February 15, 1938, the minutes of which are reported at pages 23 and 24 of Volume 5. It states that the following directors were elected for the year, M. Maffei, L. R. Arnold, A. A. Heer, Webb Richards, Peter Bercut and T. M. Ryerson. Who is Webb Richards? He is a new name here. When did he come into the company?

A. He came in about that time.

(Testimony of Michael Maffei.)

Q. Whom did he succeed?

A. I think Mr. Bernardini.

Q. Now, Mr. Maffei, at this time the Pacific Empire Holdings, Inc. had acquired practically the entire outstanding capital stock of California Pacific Service, had it not? A. At that time?

Q. In 1938.

A. They never did have it all, they had about 98 per cent.

Mr. Naus: You mean at this time, or by this time?

Mr. Scampini: By this time.

Q. You had made this investment in Pacific Service, Inc. sometime in 1935 or 1936?

A. It must have been in the year, I could not tell you exactly, it must have been around 1933 or 1934 or 1935.

Q. Was Mr. Bercut a director in Pacific Service, Inc.?

A. I don't think he ever was.

Q. You don't think he ever was?

A. Not to my knowledge.

Q. I now read into the record from page 31 of Volume 5 of the [106] minute book of Pacific Empire Holdings, Inc., dealing with the special meeting of the newly elected board of directors of Pacific Empire Holdings, Inc., in which it is reported that the following directors were present: M. Maffei, L. R. Arnold, Peter Bercut.

Mr. Naus: What is the date of that meeting?

(Testimony of Michael Maffei.)

Mr. Scampini: February 21, 1938.

“The chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

“The secretary read the minutes of the special meeting of the Board of Directors held on the 11th day of February, 1938, which by motion duly made, seconded and unanimously carried, were approved as read.

“The meeting thereupon proceeded with the election of officers, the following names being proposed for the respective offices shown: M. Maffei, President, L. R. Arnold, First Vice-President and Secretary, Peter Bercut, Second Vice-President, A. A. Heer, Jr., Treasurer, J. M. De Vleig, Assistant Treasurer, L. Garwood, Assistant Secretary.”

I now read into the record page 34 of Volume 5, dealing with the minutes of the executive committee of the Pacific Empire Holdings, Inc., in which it is reported the following members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut.

“M. Maffei, President, acted as chairman of the meeting and L. R. Arnold acted as secretary.

“The chairman determined the existence of a quorum proper and sufficient to transact business, and, thereupon called the meeting to order. [107]

(Testimony of Michael Maffei.)

“The chairman advised the committee that the meeting was called for the purpose of approving the actions of the officers in effecting the purchase of certain shares of preferred stock of Merchants Ice & Cold Storage Company.

“The Executive Vice-President, thereupon, reported to the committee that a total of $5516\frac{2}{3}$ shares of preferred stock had been purchased at the total cost of \$7604.68. The purchase of this stock was in accordance with the policy of the company to increase its holdings in Merchants Ice & Cold Storage Company whenever practicable to do so. In this connection, arrangements were made through the Anglo-California National Bank, whereby the purchase of $5516\frac{2}{3}$ shares of preferred stock was effected, and the notes of the corporation, total \$9,500, were given the California Baking Company in payment. The corporation receiving, therefor, the preferred shares referred to and \$1895.32.

“By motion duly made, seconded and carried, the following resolution was adopted:

“Whereas, on January 18, 1938, the corporation was able to increase its preferred holdings in Merchants Ice & Cold Storage Company by $5516\frac{2}{3}$ shares, at the total cost to the corporation of \$7604.68, and

“Whereas, the corporation was able to finance the said purchase through the Anglo California

(Testimony of Michael Maffei.)

National Bank by its notes aggregating \$9,500, issued in favor of California Baking Company, now, therefore, be it

“Resolved: That the actions of the officers in effecting the said purchase of 5516 $\frac{2}{3}$ preferred shares of stock of Merchants Ice & Cold Storage Company, hereinabove referred to, be and it is hereby approved.” [108]

Q. What was that block of stock, if you recall?

A. The block of stock was bought from Louis Sutter, of the Anglo Bank.

Q. Whom did he represent in the transaction?

A. I don't know who he represented.

Q. Wasn't this block of stock the block of stock of William A. Sherman?

A. It might have been, but I could not guarantee who the stock belonged to. I know the deal was made with Louis Sutter.

Q. Mr. Sutter was the Executor of the Estate of William A. Sherman, was he not, to your knowledge? T. I don't know.

Mr. Naus: He was one of two executors, wasn't he?

Mr. Scampini: Yes.

Q. Were you adding to the holdings of the Pacific Empire Holdings, Inc. in the Merchants Ice & Cold Storage Company whenever you had an opportunity to do so?

A. I think so, the minutes will prove that.

(Testimony of Michael Maffei.)

Mr. Naus: I ask that the answer go out as not responsive and as the conclusion of the witness.

The Court: It may go out.

Mr. Scampini: Will you read the question?

(Question read.)

A. We were.

Q. You already had control of the company at that time, did you not? A. That is right.

Q. You deemed it advisable and good business, and prudent business at that time?

A. At that time we thought it was a good buy.

Mr. Scampini: I now read into the record, may it please the Court, the minutes of the meeting of the board of directors held November 12, 1938, beginning with page 40 and ending with the exhibit attached thereto on page 54:

“At this meeting it was reported that the following members [109] were present and acting: M. Maffei, L. R. Arnold, A. A. Heer, Jr., Peter Bercut, Luigi Giachini, Webb Richards. The following director was absent: T. M. Ryerson.”

Q. Who was Ryerson?

A. He was manager of the laundry at Bakersfield.

Q. On page 41 it is set forth as follows:

“The Executive Vice-President further reported upon the steps taken by the management to place the company and subsidiaries in sufficient liquid condition to meet the demands of Merchants Ice & Cold Storage Company, pur-

(Testimony of Michael Maffei.)

suant to the previous authorizations of the Board of Directors and the Executive Committee resulting that 500 shares of stock of Pacific National Bank has been authorized to be sold by Pacific Empire Corporation. Pending the said sale, advances have been made by Pacific Empire Corporation and this corporation, aggregating to date, approximately \$35,000."

Will you now tell us or state to the best of your recollection exactly what you did on or about that time with regard to authorizing the disposition of the block of stock owned by Pacific Empire Corporation, as I understand it, in the Pacific National Bank of San Francisco.

A. Why it was sold?

Q. To the best of your recollection the circumstances under which it was sold.

A. Well, that block of stock was sold for the sole purpose of retiring our loans with the Pacific National Bank.

Q. Whose loans were they?

A. Whose loans?

Q. Yes.

A. I guess the loan of the Pacific Empire Holdings.

Q. Why had you incurred indebtedness at the Pacific National Bank of San Francisco?

A. To support the Merchants Ice & Cold Storage Company.

(Testimony of Michael Maffei.)

Q. You deemed it advisable to discuss at your board the authoriza- [110] tion to dispose of the block of stock in the Pacific National Bank of San Francisco?

A. Well, at that time I thought it was all right.

Q. But you deemed it advisable to get the approval of your board before the sale was authorized, did you?

A. I think the board passed on it after.

Q. Had you already sold that stock before this meeting, Mr. Maffei, this meeting having been held on November 12, 1938?

A. Well, doesn't it show in the minute book, there?

Q. I am asking you for your best recollection.

A. I don't remember.

Q. Isn't it true that 441 shares of this block of stock were not sold until 1942?

A. Well, there were other blocks.

Q. There were how many, altogether?

A. There were two blocks.

Q. There were 280 shares?

A. That is one.

Q. When was that sold?

A. I couldn't just remember the date it was sold.

Q. Was it sold about the time that the minutes which I have read show?

A. It must have been at the time.

Q. The subsequent block was sold in 1942, is that right?

A. Yes.

(Testimony of Michael Maffei.)

Q. I notice here on page 42, Mr. Maffei, in the minutes of this special meeting of the board of directors, the following statement:

“The Executive Vice-President reported to the Board of Directors upon the revenue stamp tax claims assessed against the corporation by the office of the Collector of Internal Revenue, on account of the acquisition during the year 1934, of the capital stock of California Pacific Service, Inc., then known as Laundry Service Company of California, and the granting of an option covering the sale of the shares [111] of stock of the said California Pacific Service, Inc.

“It was further reported that the firm of Messrs. Ellis & Steindorf, attorneys at law, have been engaged by the corporation to defend these claims, the said claims aggregating, with interest and penalties, approximately \$30,000. It was the opinion of the management that counsel should be retained on a contingency basis, which has been done according to the agreement dated September 12, 1938, entered into between this corporation and Messrs. Ellis & Steindorf, herein referred to as Exhibit ‘C’.

“Upon motion duly made, seconded and unanimously carried, the steps taken by the officers toward defending the revenue stamp tax claims assessed against the corporation by the Collector of Internal Revenue, were approved.”

(Testimony of Michael Maffei.)

Will you please state the circumstances giving rise to that statement in the minute book, to the best of your knowledge and recollection?

A. The whole transaction?

Q. As to this claim of the Government.

A. The claim of the Government was on the stock of the Laundry Service, at Bakersfield, at the time they took over the stock, they did not pay the transfer tax, and there was some option given at that time, which included 1931 or 1932—it came out of a clear sky.

Q. It came out of a clear sky?

A. That is correct.

Q. When it came out of a clear sky you deemed it advisable to defend the claim? A. Yes.

Q. You employed counsel on a contingent basis, didn't you? A. Yes.

Q. Percentage basis? A. Yes.

Q. But you deemed it advisable to discuss that with your board before you gave them a contract on it?

A. If it says that in the minutes naturally we did. [112]

Mr. Naus: I ask that that go out as not responsive.

Mr. Scampini: It is right in the minutes.

I desire now to read into the record the minutes of the executive committee meeting held December 16, 1938—the pages are no longer numbered, but they follow page 54. It reports the following mem-

(Testimony of Michael Maffei.)

bers were present and acting: M. Maffei, L. R. Arnold, Peter Bercut. Then it goes on to state:

“The chairman advised the committee that the meeting was called for the purpose of considering and acting upon the proposal to purchase certain shares of stock of Frostkraft Packing Corporation, a corporation, which is a tenant of Merchants Ice & Cold Storage Company, and organized under the sponsorship of the management of that company.

“The Executive Vice-President thereupon reported at length upon certain steps taken by the officers of this corporation to assist in the development of Frostkraft Packing Corporation, which program necessitates the acquisition of additional paid in capital. To that end, the firm of Messrs. Stephenson-Leydecker & Co., investment bankers, have agreed to assist in the sale and distribution of an additional 5000 shares of the stock of Frostkraft Packing Corporation. Applications for the permit to sell this new issue are now pending before the Division of Corporations of the State of California.

“The Executive Vice-President submitted certain data concerning the history and business of Frostkraft Packing Corporation, the plans for capitalization and development, the balance sheet and statistical data concerning the industry, etc. Upon the conclusion of a general discussion concerning Frostkraft Packing Corpo-

(Testimony of Michael Maffei.)

ration and the program for [113] its development, it was the recommendation of the Executive Vice-President that this corporation subscribe for 1000 shares of stock, to be paid for over a period of time, at a cost of \$10 per share, the corporation to receive a like number of shares as bonus stock."

Will you please state to the best of your knowledge and recollection the circumstances under which you thought it would be prudent business to invest an additional \$10,000 in a new corporation?

A. It was not \$10,000.

Q. How much did you subscribe?

A. It was one or two thousand dollars.

Q. What induced you to think it was good business for the holding company to invest a few thousand dollars in a new corporation?

A. Of course, that was a tenant of the Merchants Ice & Cold Storage Company, and I thought it would be a very lucrative investment, and we got a permit to sell some stock through the Leydecker Company, they sold a few thousand dollars and could not succeed in selling more.

Q. Did the holding company make an investment of \$2,000?

A. I think it was one or two thousand dollars.

Q. Who was the manager of the Merchants Ice & Cold Storage Company at that time?

Mr. Naus: At what time?

(Testimony of Michael Maffei.)

Mr. Scampini: December 16, 1938, do you remember?

A. William A. Sherman was.

Q. He was what? A. He was president.

Q. What were you?

A. I was vice-president.

Q. What was Mr. Arnold? A. Director.

Q. And Mr. Bercut?

A. I do not think Mr. Bercut was a director at that time. [114]

Q. Are you sure about that?

A. I am not sure, but I think he was not.

Q. Were you active in the management of the Merchants Ice & Cold Storage Company?

A. In and out.

Q. Were you drawing a salary at that time from the Merchants Ice & Cold Storage Company?

A. I can't recall if I was or not.

Q. Did Merchants Ice & Cold Storage Company make any investment in Frostkraft Packing Corporation at that time? A. I don't know.

Q. Don't you remember? A. I do not.

Q. You don't know?

A. Because I don't remember.

Q. Do you remember that Merchants Ice & Cold Storage Company extended considerable credit to Frostkraft Packing Corporation at that time?

A. I think they guaranteed some notes.

Q. Did you know about that at the time?

A. Well, more or less I did.

(Testimony of Michael Maffei.)

Q. Did you think it was good business to do so?

A. Well, the amount was so small that it did not amount to much, anyway.

Q. You were trying to build up the tenants, is that correct?

A. That is correct.

Q. I am now reading into the record from the minutes of the executive committee meeting of January 3, 1939; as I say, the pages are no longer numbered, but they follow page 56. It is reported at this meeting that the following members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut.

“The chairman determined the existence of a quorum proper and sufficient to transact business, and thereupon called the meeting to order.

“The secretary read the minutes of the Executive [115] Committee meeting held on the 21st day of March, 1938, and the 16th day of December, 1938, which by motion duly made, seconded and unanimously carried, were approved as read.

“The President stated that the meeting was called for the purpose of discussing the obligations owing by the company to Joseph McInerney, which have been past due for a considerable time. The President reported that Mr. McInerney had been making strenuous demands for the payment of these notes, or, if the company is unable to pay, a compromise to be worked out on a basis satisfactory to him. The

(Testimony of Michael Maffei.)

company, being unable to pay, certain steps had been previously taken, within the knowledge of the Committee, to obtain small loans for the purpose of accumulating sufficient funds to discharge this obligation. The company has been able to raise only approximately \$5000.

"The President further reported that Mr. McInerney had proposed a compromise settlement whereby title would be given to him of the controlling interest in the stock of the California Pacific Service, Inc., with a pooling or voting agreement to be entered into between each of the parties. The Executive Committee entered into a further discussion of the subject and, upon motion duly made, seconded and unanimously carried, the following resolution was adopted:

"Whereas, a demand note in the amount of \$15,000 is owing to Joseph McInerney, and the corporation is at this date unable to pay the said note, and

"Whereas, it appearing for the best interest of the company that a compromise settlement be worked out in order [116] to discharge these obligations, now, therefore, be it

"Resolved: That the President, Vice-President and Secretary are hereby authorized to enter into negotiations with the said Joseph McInerney, to bring about a settlement of these obligations and report back to the Committee before the final settlement is concluded."

(Testimony of Michael Maffei.)

About this time, Mr. Maffei, it is a fact, is it not, that the financial condition of the holding company was becoming very acute? A. Right.

Q. And the financial condition of the Pacific Empire Corporation was likewise becoming very acute, was it not? A. Yes.

Q. Will you state the reason why the financial condition of the Pacific Empire Corporation had become acute?

A. Well, they just got short of finances. We had to meet interest on the loans at the bank.

Q. Whose obligations are you referring to when you say "we"?

A. Well, we had notes by the holding company that had to be met.

Q. Had the holding company borrowed all it could borrow from the Pacific Empire Corporation? A. It borrowed all it could.

Q. Was there anything else left in the Pacific Empire Corporation which it borrowed at this time?

A. I don't think there was.

Q. And you deemed it advisable to sell the controlling interest in this laundry company to McInerney in an effort to compromise this claim for \$15,000?

A. Mr. McInerney was in a position, if he wanted to close, he could take it all.

Q. You thought it advisable?

A. I thought we had better lose half than all.

Q. You called the executive committee together

(Testimony of Michael Maffei.)

and discussed the whole matter before the executive committee, didn't you? [117]

A. If it says so in the minutes, we did.

Q. I am asking you, did you or did you not? Don't you recall that circumstance?

A. I don't recall it now.

Q. You do not? A. No.

Q. The reading of the minutes does not refresh your recollection in that respect?

A. We had so many meetings, as I said before, I don't remember.

Q. What was the reason for directing the executive vice-president, so-called, to conclude the negotiations and report back to the executive committee?

A. There was not much of a meeting, the only thing was it was concluded to make the deal and the deal went through.

Q. I did not ask you that. Will you read the question? That is not a reply to the question.

(Question read.)

A. Well, that was the only way for us to make the deal go through, so we did.

Q. But you were not willing to give your Vice-President full authority to go and make the deal?

A. I think he reported back to the committee.

Q. Did you direct him to report back to the executive committee?

A. He reported back to me.

Q. Were you the executive committee?

A. I was one of them.

(Testimony of Michael Maffei.)

Q. You said the reason was, among others, you had guaranteed notes. Whose notes had you guaranteed?

A. Well, we guaranteed our own notes when we made borrowings at the bank.

Q. Anybody else's notes?

A. And the notes upon the Pacific Empire Holdings' property.

Q. Had you guaranteed any of the Merchants Ice & Cold Storage Company's notes?

A. We guaranteed some, yes. [118]

Mr. Scampini: I now desire to read into the record the minutes of the special meeting of the newly elected board of directors of Pacific Empire Holdings, Inc., held February 15, 1939, following the stockholders meeting, and which is found on pages 63 to 65, inclusive, at which it is stated that the following directors were present: M. Maffei, L. R. Arnold, A. A. Heer, Jr., Peter Bercut, Luigi Giachini, Webb Richards. The following director was absent: T. M. Ryerson.

"The meeting thereupon proceeded with the election of officers, the following names being proposed for the respective offices shown: M. Maffei, President, L. R. Arnold, First Vice-President and Secretary, Peter Bercut, Second Vice-President, A. A. Heer, Jr., Treasurer.

"The chairman declared the nominations closed, thereupon, by unanimous vote of all Directors present, the individuals nominated were

(Testimony of Michael Maffei.)

declared elected to the respective offices shown, to hold office during the ensuing year, or until their successors had been elected, with annual salaries now prevailing, as authorized and set forth in minutes of previous meetings of the Board of Directors.

“Upon motion duly made, seconded and unanimously carried, the First Vice-President was authorized to use the title of Executive Vice-President, which authorization in no way alters the authority of the office of the First Vice-President in accordance with the provision of the by-laws.”

Do you recall the circumstances under which Mr. Arnold desired to be called executive vice-president?

A. Well, I suppose he wanted to be an executive vice-president. He was first vice-president and he could as well be executive vice-president.

Q. There is no mention of executive vice-president in the by-laws [119] which are now in evidence.

A. That is right, the by-laws do not call for one.

Q. Isn't that the reason why you inserted in there that it shall in no way alter the authority of the office of the first vice-president or increase the authority of the first vice-president?

A. I guess we gave him the title of executive vice-president for the sake of having that name.

Mr. Scampini: I desire to read into the record, in addition to what I have stated in connection with the minutes of the special meeting of the newly

(Testimony of Michael Maffei.)

elected directors of the Pacific Empire Holdings, Incorporated, shows that there is attached to these minutes, being pages 66 to 72, inclusive, the auditor's report of April 24, 1939, prepared by Haskins & Sells, certified public accountants, a copy of the auditor's report.

Now I desire to read into the record the minutes of the executive committee meeting held June 26, 1939, at the hour of 10:00 o'clock a.m., by which it was reported the following members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut.

"The chairman advised the Committee that the purpose of the meeting was to consider and act upon the annual report and consolidated balance sheet to be mailed in printed form to all stockholders of record.

"The Executive Vice-President thereupon presented the proof of the printed report as prepared by him, and the consolidated balance sheet, as prepared by the Treasurer as of December 31, 1938. A general discussion took place concerning the subject contained in the report and the consolidated balance sheet, herein referred to as Exhibit 'A', and thereupon, by motion duly made, seconded and unanimously [120] carried, the said report and balance sheet were approved as prepared, and the Secretary was instructed to mail a printed copy of the said report and balance sheet to all stockholders of record."

(Testimony of Michael Maffei.)

Q. I now show you, Mr. Maffei, what appears to be the printed copy of the report, Exhibit A, referred to in the minutes of May 31, 1939, which appears to have been sent by order of the Board of Directors under the signatures of M. Maffei, President, and L. R. Arnold, Executive Vice-President.

A. That is right.

Q. This went out to the stockholders, did it not?

A. Yes.

Q. I note in this report, found on page 78 in Volume 5, you state as follows, among other things——

The Court: Is this the report of the public accountants you are reading?

Mr. Scampini: No, the report to the stockholders.

“Merchants Ice & Cold Storage Co.: During the year 1938, even though the volume of business enjoyed by Merchants Ice & Cold Storage Company was \$71,429.78 less than that of the previous year, substantial progress was made by the management to restore the company to a sound financial condition. Bank loans, taxes and accounts payable to trade creditors, etc. were substantially reduced, resulting in the total reduction of current liabilities during the year of \$66,009.23. Throughout this retrenchment program, the condition of the company's physical properties was greatly improved by the installation of new plant improvements, completed during the year 1938 at the total installation cost of \$30,351.69.”

(Testimony of Michael Maffei.)

I note here that you still carried the common stock of [121] Merchants Ice & Cold Storage Company at \$522,638.25 and the preferred stock of Merchants Ice & Cold Storage Company at \$118,265.66.

A. Correct.

Q. And you stated to your stockholders:

“In previous annual reports, it was stated that, as a part of the program of the development of your corporation, your Board of Directors would, consistent with the corporation’s ability to do so, increase its investment position in any of the operating companies in which it is at present interested. To that end, during the annual period of 1938, and in accordance with the previously adopted policy, the preferred and common stockholdings in Merchants Ice and Cold Storage Company were increased by 18,727½ shares. In this connection, the management contemplates effecting additional acquisitions of either preferred or common stock whensoever the corporation is in position to do so.”

Did you feel that it was wise and prudent business, as president of the Pacific Empire Holdings, to continue to increase the investment of the holding company in Merchants Ice & Cold Storage Company?

A. At that time, yes.

Q. Every time you had an opportunity to buy some you would buy it, would you not?

A. Yes.

(Testimony of Michael Maffei.)

Q. Of course, you would buy it as quickly as you possibly could? A. Yes.

Q. Was there much activity in the sale of the stock? A. No.

Q. Every once in a while there would be a few shares come up? A. We would pick it up.

Q. You would pay the least possible price you could pay for it? A. Yes. [122]

Q. You would pick up the stock? A. Yes.

Q. I now desire to read into the record the minutes of the annual meeting of stockholders held on the 15th day of February, 1940, which minutes are found at pages 79 to 84, inclusive. At page 83, it is said that the following were elected as directors, M. Maffei, A. A. Heer, J. L. Arnold, Luigi Giachini, Webb Richards, Peter Bercut, T. M. Ryerson.

I will now show you here, Mr. Maffei, what appears to be the balance sheet of Pacific Empire Holdings, Inc. dated December 31, 1939, which is attached to and made a part of the minutes of the annual stockholders' meeting, found at pages 85 and 86, and I will ask you to look it over and state whether or not, to the best of your recollection, that reflects the assets and liabilities and shows the indebtedness of the company as of December 31, 1939.

A. That is correct. What is here is correct.

Q. I now desire to read into the record, may it please the Court, the following liabilities as of December 31, 1939:

(Testimony of Michael Maffei.)

“Minority stockholders’ interest, California Brotherhood Investment Company, \$208.76.

“Minority stockholders’ interest, Calitalo Investment Co., \$27,664.90.

“Accounts payable, California Pacific Service, Inc., \$1,138.33.

“Accounts payable, Sundry, \$9,745.36.

“Accounts payable, Corporation Trust Co., \$36.46.

“Notes payable, Corporation Trust Co., \$1750.

“Accounts payable, Safe Deposit Company, \$690.

“Accrued taxes payable, \$11.86.

“Subscriptions payable \$10,000.”

Might I ask if that was the Frostkraft Packing Corporation [123] stock that you bought?

A. I can’t remember.

Q. “Notes payable, Pacific Empire Corporation, \$86,019.90.

“Notes payable, Pacific National Bank, \$56,000.

“Notes payable, Joseph McInerney, \$15,000.

“Notes payable, A. J. Scampini, \$1800.”

That was the balance due on the note given to me in 1936, is it not? A. That is right.

Q. “Notes payable, W. H. Roussell, \$6700.”

Did that not represent the balance due to Mr. Roussell for the purchase of his 700 shares of preferred stock? A. Right.

(Testimony of Michael Maffei.)

Q. Which you agreed to buy at \$10 a share?

A. That is right.

Q. \$7000, and you still owed him \$6700?

A. Yes.

Q. "Notes payable, Edward Molkenbuhr, \$5955.38."

Did that not represent the balance due to Mr. Molkenbuhr for the purchase of certain shares in the Standard Transportation Corporation, which was one of your subsidiaries?

A. That is right.

Q. "Notes payable, California Baking Company, \$5300."

Wasn't that the balance due for the purchase of a block of stock in the Merchants Ice & Cold Storage Company?

A. From Louis Sutter.

Q. "Notes payable, L. R. Arnold, Liquidating Agent, \$59,373.60."

A. Well, he was liquidating for the City National Bank, and I suppose that——

Mr. Naus: Could we have him leave out the "suppose"?

The Court: If he knows he may answer.

A. The Company took over some notes from the liquidating agent, which the company would have to pay.

Mr. Scampini: Q. Let me see if I can refresh your memory: Mr. Arnold, at the time the City National Bank of San Francisco [124] sold its assets to the Pacific National Bank of San Francisco, was appointed the liquidating agent for the

(Testimony of Michael Maffei.)

remainder of the assets of the City National Bank?

A. That is right.

Q. And, of course, as liquidating agent, he was liquidating the remaining assets or distributing them to the stockholders of the City National Bank in San Francisco, is that right? A. Yes.

Q. And, of course, the stockholders of the City National Bank of San Francisco included the Pacific Empire Holdings, Inc., is that right?

A. It happened to have a few shares in the City National Bank, about 10 per cent.

Q. When the City National Bank of San Francisco went into liquidation Pacific Empire Holdings had 52 per cent? A. 52.

Q. Thereafter, through Pacific Empire Corporation it picked up some more stock?

A. That is right.

Q. And increased its holding in the City National Bank of San Francisco? A. Yes.

Q. But there were still quite a few stockholders still out? A. There were a few out.

Q. The assets in the hands of the liquidating agent were borrowed by the Pacific Empire Holdings, Inc., were they?

A. There was no cash borrowed, there was no cash there.

Q. You borrowed the assets?

A. We took the notes.

Q. You executed promissory notes of the holding company?

(Testimony of Michael Maffei.)

A. Whether they got the notes, or not, I don't know.

Q. "Notes payable, Kohler & Chase, \$11,637.82."
Who were Kohler & Chase?

A. They are the landlords of the building.

Q. You had not been able to pay rent to them?

A. That is unpaid rent. [125]

Q. This represents unpaid rent? A. Yes.

Q. "Notes payable, Sundry, \$5057.60.

"Accrued interest payable, \$2075.87.

"Interest payable, L. R. Arnold, Liquidating Agent, \$3562.40."

Does that refresh your mind with respect to whether or not a promissory note had been given by the holding company to Arnold, the liquidating agent?

A. He might have had a note, or it might have been just bookkeeping, I don't know.

Q. Who was really operating and managing this set-up?

Mr. Naus: What do you mean by "this set-up"?

Mr. Scampini: Pacific Empire Holdings and Pacific Empire Corporation.

A. Both I and Arnold.

Q. Now, I desire to read into the record the minutes of the Board of Directors meeting held February 15, 1940, which are found at pages 89 to 91 of Volume 5, in which it is reported the following directors were present and acting:

(Testimony of Michael Maffei.)

M. Maffei, L. R. Arnold, A. A. Heer, Jr., Peter Bercut, Luigi Giachini, Webb Richards. Absent, T. M. Ryerson.

“The meeting thereupon proceeded with the election of officers, the following names being propoesd for the respective offices shown: M. Maffei, President, L. R. Arnold, Vice-President and Secretary, Peter Bercut, Vice-President, A. A. Heer, Treasurer.

“The chairman declared the nominations closed, thereupon, by unanimous vote of all directors present, the individuals nominated were declared elected to the respective offices shown, to hold office during the ensuing year or until their successors have been elected, with annual [126] salaries now prevailing, as set forth in minutes of previous meetings of the Board of Directors.

“Upon motion duly made, seconded and unanimously carried, the Vice-President and Secretary was authorized to use the title of Executive Vice-President, which authorization in no way alters the authority of the office of the Vice-President and Secretary, in accordance with the provisions of the by-laws.

“The Chairman announced that the election of an Executive Committee was the next order of business, thereupon the following names were proposed: M. Maffei, L. R. Arnold, Peter Bercut.

(Testimony of Michael Maffei.)

“The Chairman declared the nominations closed, thereupon, by unanimous vote of all directors present, the individuals nominated were declared elected members of the Executive Committee, to hold office during the ensuing year, or until their successors had been elected, each member, except salaried officers, to receive a fee of \$10 for each meeting.”

I now desire to read into the record the minutes of the executive committee meeting held March 8, 1940, found at page 91, together with the exhibits, ending at page 96, and in which it is reported the following members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut.

“The secretary read the minutes of the Executive Committee meeting held on the 30th day of September, 1939, which by motion duly made, seconded and unanimously carried, were approved as read.

“In accordance with the resolution adopted at the meeting of the Executive Committee held on the 3rd day of [127] January, 1939, the President and the Executive Vice-President reported upon the results of negotiations carried on with Joseph McInerney, in connection with the settlement of the obligations owing to him by the corporation.

“After considerable negotiations, arrangements had been made whereby the corporation is able to discharge its obligations by transfer-

(Testimony of Michael Maffei.)

ring to Joseph McInerney title to a 47½ per cent interest in California Pacific Service, Inc.; the corporation to retain an equal interest, and 5 per cent of the stock to be placed in a 21-year voting trust."

Now, Mr. Maffei, as a result of this transaction the Pacific Empire Holdings, Inc. became a minority stockholder in California Pacific Service, Inc., is that right? A. That is right.

Q. Now, before authorizing that transaction, Mr. Maffei, you deemed it advisable and prudent to call a special meeting of the Executive Committee to authorize it, didn't you?

A. Well, I think that we had the meeting——

Q. "Yes" or "No", did you or did you not deem it advisable?

A. I don't know whether I called it before or after.

Q. If it was before, you deemed it advisable to call this special meeting of the Executive Committee to pass upon it?

Mr. Naus: One moment, that is objected to as conjectural and argumentative.

The Court: The objection will have to be sustained.

Mr. Scampini: I note here on page 93 the following statement, which I will read into the record:

"The Executive Vice-President reported at length upon the sale of 280 shares of stock of Pacific National Bank of San Francisco by

(Testimony of Michael Maffei.)

Pacific Empire Corporation, at \$125 per share, credit for the proceeds having been received by the [128] corporation as of December 30, 1939 and loaned to this corporation.”

In other words, if I construe these minutes correctly, and I am asking you for your knowledge and best recollection, 280 shares of the stock of the Pacific National Bank of San Francisco had been sold by Pacific Empire Corporation at \$125 a share.

A. Right.

Q. To Mr. Gaither, of the Pacific National Bank?

A. That is right.

Q. And the proceeds were received on December 30, 1939, by Pacific Empire Corporation, is that right?

A. That is right.

Q. And by the Pacific Empire Corporation, in turn, loaned to Pacific Empire Holdings?

A. Yes.

Q. Who caused the loan to be made from one to the other?

A. I think the sale was made to help the Merchants Ice & Cold Storage Company.

Q. You were president of both companies?

A. Yes.

Q. And the loan was made by one to the other?

A. That is the only way we could get our money.

Q. I notice you also state here,

“The President reported that the 280 shares of stock of Pacific National Bank sold, had cost Pacific Empire Corporation \$..... per

(Testimony of Michael Maffei.)

share, and the sale at \$125 was effected by Pacific Empire Corporation at the rest of Pacific Empire Holdings, Inc., in order that additional loans could be made by Merchants Ice & Cold Storage Company."

Is that a true statement of the circumstances under which those shares were sold?

A. It must be if it is in the minutes.

Q. I am asking, is that a true statement of the circumstances?

A. That is what the loans were for.

The Court: We will take a short recess.

(Recess.) [129]

Mr. Scampini: Q. During the morning session I asked you the question whether Mr. Bercut, to your knowledge and best recollection, was ever a director of California Pacific Service, Inc., and you said you did not think so, if I remember correctly.

A. I don't remember his being one.

Q. I will ask you to take a look at this book and see if you recognize it.

A. He was a director.

Q. He was a director of Pacific Service, Inc.?

A. Yes.

Q. Is that his signature at the bottom of the minutes? A. Yes.

Q. On page 270? A. Yes.

Q. To your knowledge it is?

A. I think it is.

Q. That is your signature on there, isn't it?

(Testimony of Michael Maffei.)

A. It sure is.

Mr. Naus: Has that been marked for identification?

Mr. Scampini: I am merely asking him whether he was a director in California Pacific Service, Inc.

Mr. Naus: If it is something in the nature of a minute book exhibited to the witness and he is asked a few questions about it, I think it should be marked for identification, so it can be examined.

Mr. Scampini: In the interest of time, I will offer this as our next exhibit in order, the minute book of California Pacific Service, Inc., Volume 1, and ask that the minutes of the special meeting of the board of directors found on pages 70 to 75, inclusive, be marked Plaintiff's Exhibit 14 for Identification.

(The document referred to was marked "Plaintiff's Exhibit 14 for Identification.")

I now desire to read into the record the minutes of the Executive Committee meeting of the Pacific Empire Holdings, Inc., held October 17, 1940, found on pages 100 and 101 of Volume 5 of the minutes at which it is reported that the following [130] members were present and acting: M. Maffei, L. R. Arnold, Peter Bercut, and ask you whether or not your signature appears on these minutes at the bottom, Mr. Maffei.

A. That is right.

Q. And Mr. Arnold's? A. Yes.

Q. Mr. Bercut is not there? A. Right.

Q. Was Mr. Bercut a director at that time?

(Testimony of Michael Maffei.)

A. What year was that?

Q. October, 1940.

A. To my recollection, he was.

Q. Was he a member of your executive committee? A. At the same time, yes.

Q. And you would not say the minutes did not reflect the truth? A. No.

Q. You won't say they are true and correct?

A. That is right.

Q. You would not say that he was present if he was not, would you? A. I would not.

Q. You would not? A. No.

Q. I now desire to read into the record the minutes of the special meeting of the Board of Directors of Pacific Empire Corporation, also held October 17, 1940, at which it is reported that the following directors were present and acting: M. Maffei, A. A. Heer, Jr., Webb Richards, L. R. Arnold, Peter Bercut. I will ask you whether or not that is your signature at the bottom of the page.

A. Yes.

Q. And is that the signature of A. A. Heer, Jr., Secretary? A. Yes.

Q. Was Mr. Bercut a director of Pacific Empire Corporation on that date, to the best of your knowledge and recollection?

A. To my best knowledge he was.

Q. You would not say he was not, would you?

A. No.

(Testimony of Michael Maffei.)

Q. You would not say he was present if he was not? A. No. [131]

Q. Was Mr. Bercut at that time a director of the Pacific National Bank of San Francisco?

Mr. Naus: What time?

Mr. Scampini: October 17, 1940.

A. He was.

Q. Would you state the circumstances under which Mr. Bercut became a director of the Pacific National Bank of San Francisco, if you know?

A. Well, Mr. Bercut liked to be a director of the bank, and I spoke to Mr. Gaither when the election came on in January and they put him on.

Q. Were you a director of the bank at that time? A. I was.

Q. You also were president, of course, of Pacific Empire Corporation, were you not?

A. That is right.

Q. And Pacific Empire Corporation owned about 770 shares of the bank at that time?

A. That is right.

Q. And from your holdings in the bank owned by Pacific Empire Corporation you had the means of causing Mr. Bercut to be elected?

A. Correct.

Q. You caused him to be elected as a director of the bank because he was one of the managing officers of the company, wasn't he?

A. He made a good director.

Mr. Naus: You say there were 771?

(Testimony of Michael Maffei.)

Mr. Scampini: There were originally fifteen hundred and some odd.

Mr. Naus: I thought there were 280 shares and 441 shares mentioned.

Mr. Scampini: 280 and 441 and there were some odds and ends; there were 771 altogether.

Q. Now, Mr. Maffei, was Mr. Bercut a director in Merchants Ice & Cold Storage Company on October 17, 1940?

A. In 1940, I think he was. [132]

Q. You were president and a director of Merchants Ice & Cold Storage Company, were you not?

A. Yes.

Q. Of course, the controlling interest in Merchants Ice & Cold Storage Company was in the Pacific Empire Holdings? A. That is correct.

Q. Who caused Mr. Bercut's election on the board of directors, if you know?

A. Who caused it—Mr. Bercut liked to become a director, so I suggested putting him on.

Q. Whose place did he take, do you recall? Did he take Mr. Roussell's place?

A. I think he did.

Q. Was Mr. Will S. Morse a director of the Merchants Ice & Cold Storage Company in October, 1940?

A. I think he was chairman of the board of directors.

(Testimony of Michael Maffei.)

Q. And Mr. Morse was formerly president of the Bank of America? A. Yes.

Q. He had been chairman of the Merchants Ice & Cold Storage Company for some years, had he not? A. Yes, he had been for a year or two.

Q. A year or two before this date of October 17, 1940?

A. He became director after Sherman got out.

Q. Did he not represent the bondholders' trustee?

A. Right.

Q. And he acted as a director?

A. That is right.

Q. Was Mr. Arnold the vice-president of the Merchants Ice & Cold Storage Company on October 17, 1940?

A. Mr. Arnold became president right after Mr. Sherman died.

Q. When did Mr. Sherman die?

A. I can't remember the date.

Q. Was it 1938 or 1939?

A. I think it was 1938 or 1939.

Q. He was president, to your best recollection, on October 17, 1940, wasn't it?

A. To the best of my recollection, yes. [133]

Q. As vice-president and director of the Merchants Ice & Cold Storage Company you had occasion to see and approve all financial reports and letters which were sent out to the stockholders of the Merchants Ice & Cold Storage Company after the annual meetings?

A. It was by order of all the directors.

(Testimony of Michael Maffei.)

Mr. Scampini: Mr. Brownstone, I asked you to produce the letters sent out to the stockholders and the annual reports of 1936, 1937, 1938, 1939, 1940 and 1941 and 1942.

Mr. Brownstone: There they are.

Mr. Scampini: Q. Now, you said prior to the recess, Mr. Maffei, in connection with my inquiry with respect to the amount of the investment made in Frostkraft Packing Corporation that you thought it was only about one or two thousand dollars.

A. That is my recollection, yes.

Q. I show you here a financial report that you sent out to your stockholders of May 31, 1939, which I have already read into evidence, and concerning which you have testified, and I note here that the assets include capital stock of Frostkraft Packing Corporation, \$10,000.

A. We signed up for \$10,000, but I do not think we took it all.

Q. Note B, referring to Frostkraft Packing Corporation, says,

“The capital stock of Frostkraft Packing Corporation is of \$10 par value. The investment in this stock is carried at cost.”

Is that what it cost the Pacific Empire Holdings, \$10,000? A. If they bought that much, yes.

Mr. Naus: What page is that on?

Mr. Scampini: Page 78, Volume 5, mailed to stockholders May 31, 1939.

Q. Now, referring again to the balance sheet of

(Testimony of Michael Maffei.)

Pacific Empire [134] Holdings, Inc., dated December 31, 1939, which is part of the annual stockholders' meeting of the company held on February 15, 1940, and which is found on pages 85 and 86 of Volume 5 of the minute book of said company, and concerning which you have already testified, I notice that in the liabilities which are listed in the record, there is no liability shown on December 31, 1939, of Merchants Ice & Cold Storage Company. At that time was Pacific Empire Holdings, Inc., or Pacific Empire Corporation indebted to Merchants Ice & Cold Storage Company?

A. What date?

Q. December 31, 1939.

A. I could not guarantee yes or no.

Q. I notice here on the assets side that you have accounts receivable, Merchants Ice & Cold Storage Company, \$13,636, and liabilities do not show anything. A. I guess that is right, then.

Q. At the end of the year 1939 the Holding Company had money coming from the Merchants Ice & Cold Storage Company?

A. Correct, according to the minute book.

Q. Now, Mr. Maffei, on or about November 20, 1940, in an action which had been instituted by the United States for the collection of these taxes, that the minutes indicate, concerning which you have already testified, and which action is entitled, "United States of America, Plaintiff, vs. Pacific Empire Holdings, Inc., a Delaware corporation,

(Testimony of Michael Maffei.)

In the Southern Division of the United States District Court for the Northern District of California, Case No. 21,140-W'' was there a judgment obtained in favor of the United States against the holding company for the sum of \$11,942.80?

A. I think so.

Mr. Naus: If your Honor please, I think the Clerk of the Court could answer that better than this witness.

Mr. Scampini: I offer this in the record as part of our [135] record, and ask that the Clerk verify that.

Mr. Naus: What is that amount?

Mr. Scampini: \$11,942.80.

Q. When that judgment was entered, Mr. Maffei, it was a sort of bombshell, was it not?

A. It was a bombshell to us.

Q. I notice in the liabilities concerning which you have testified, as of December 31, 1939, there is no inclusion on the liability side of any indebtedness to the United States of America, is that right?

A. Maybe the judgment was not out.

Q. In other words, the judgment came sort of unexpectedly, did it not?

A. That is right.

Q. What did the company have to pay this judgment, if anything?

A. It did not have anything.

Q. Well, it had this block of stock of the Merchants Ice & Cold Storage Company?

A. Right?

Q. What, if anything, did you do toward dis-

(Testimony of Michael Maffei.)

charging this judgment? Did you ever pay the judgment? Did the company ever pay the judgment? A. Not to my knowledge.

Q. Now, Mr. Maffei, you had just sent out a report, a financial report on November 20, 1940—you had just sent out another report and letter to your stockholders, had you not? A. In 1940?

Q. Yes. I will ask you to take a look at that.

A. I think this report was printed, but I don't think it went out.

Q. Are you certain it did not go out, Mr. Maffei?

A. This is the report of 1939.

Q. Was that mailed or put out?

A. The first part of 1940.

Q. The letter is dated June 30, 1940.

A. Whatever it is.

Q. Was it mailed after June 30, 1940, to your best recollection?

A. It was mailed when it was returned.

Q. Now, I notice, here, that you told your stockholders the [136] following:

“Merchants Ice & Cold Storage Company: The company, during the year 1939, enjoyed its largest volume of business since the year 1937, realizing during that period \$65,381.05 of net profits from operations and before depreciation charges, representing the largest cash net income during many recent years included in its history of operation. Throughout the year, the company's condition became more

(Testimony of Michael Maffei.)

sound and its net current position improved by approximately \$65,000."

Is that correct? A. Yes.

Q. You were a vice-president and director of Merchants Ice & Cold Storage Company?

A. That is correct.

Q. You knew that to be a fact, didn't you?

A. That is right.

Q. "The improved condition of the corporation was accomplished even though, effective October 31, 1939, the management, after long negotiations, was compelled to grant an increase in the wage scale for the majority of its employees, which will ultimately result in increased labor cost of approximately \$15,000 annually."

Is that correct? A. Yes.

Q. Now, you are speaking from personal knowledge as a result of your position as vice-president and director of Merchants Ice & Cold Storage Company? A. Right.

Q. "This development, together with the existing high interest rate on its bonded and other indebtedness, greatly reduces the net cash profits being earned by the company. Constant progress is being made toward remedying these latter conditions.

"As set forth in this and preceding balance sheets [137] of your corporation, the investment in the controlling stock of Merchants Ice &

(Testimony of Michael Maffei.)

Cold Storage Company constitutes your corporation's largest investment."

A. That is right.

Q. That was correct, was it not? A. Yes.

Q. According to the balance sheet, which is found as a part of the letter you say the stock was valued at \$545,906.81, for the common stockholding and \$123,456.66 for the preferred stockholding.

A. Correct.

Q. Those values were arrived at from the auditor's statement of Haskins & Sells of Merchants Ice & Cold Storage Company? A. Correct.

Q. Were those values which you placed on the balance sheet of the Pacific Empire Holdings, Inc., in your opinion, a fair and reasonable value of those shares of the Merchants Ice & Cold Storage Company? A. That is right.

Q. I ask you, in your opinion, whether or not that represents a fair and true value of those shares in the possession of the Pacific Holdings.

A. Yes, that is what I would say.

Q. Did it represent, in your opinion, the fair, true and reasonable value of this block of shares?

A. Yes.

Q. As of June 30, 1940? A. Correct.

Q. You further state,

"Consequently, all steps which have been taken since the reorganization to date, have been pointed toward placing this investment on a dividend basis. It is the opinion of the man-

(Testimony of Michael Maffei.)

agement that after the elapse of another year's operation, the financial condition of Merchants Ice & Cold Storage Company will be such as to permit the company to work out certain financial readjustments affecting its bonded indebtedness and capital structure, whereby the payment of dividends will be [138] made possible consistent with the net income which may be realized. Your corporation should then profit materially."

When you made that statement to your stockholders, Mr. Maffei, as president of the Pacific Empire Holdings, Inc., and as vice-president and director of Merchants Ice & Cold Storage Company, of which company Mr. Arnold, who also signed that statement, was president, did you in good faith, from your knowledge acquired from the operations of Merchants Ice & Cold Storage Company, and knowing the condition of the company, truly and fairly and reasonably believe that the company perhaps in the following year could come to a dividend basis?

A. If they improved their condition I think they would.

Q. For that reason you stated to your stockholders further as follows:

"As evidenced by the accompanying balance sheet, the management continues to increase its holdings in the stock of Merchants Ice & Cold

(Testimony of Michael Maffei.)

Storage Company whenever the occasion warrants, thus improving its equity position, accordingly. This policy prevails toward any investment of your corporation, whenever it is possible to increase its majority holdings."

A. Yes.

Q. The company already owned substantially more than 60 per cent of the outstanding common stock of Merchants Ice & Cold Storage Company?

A. Right.

Q. It owned approximately 30 per cent or $33\frac{1}{3}$ per cent of the outstanding preferred stock, isn't that right?

A. That is right.

Q. You had more than 60 per cent of the voting power?

A. Yes.

Q. And yet you were continuing to add to the portfolio, weren't [139] you?

A. Yes.

Q. Why did you do so?

A. Because I thought it was worth it.

Mr. Scampini: I now offer in evidence as our exhibit next in order the financial report sent out to the stockholders of Pacific Empire Holdings, Inc., dated June 30, 1940.

The Court: It may be admitted, and marked.

(The document was marked "Plaintiff's Exhibit 15.")

(Testimony of Michael Maffei.)

PLAINTIFF'S EXHIBIT No. 15

PACIFIC EMPIRE HOLDINGS

Incorporated

26 O'Farrell Street

San Francisco

June 30, 1940

To the Stockholders of

Pacific Empire Holdings, Incorporated:

This is the annual report of the management, covering the operation of your corporation for the year 1939, accompanied by the Consolidated Balance Sheet of the corporation at the close of business, December 31, 1939, as prepared by the Treasurer.

Merchants Ice and Cold Storage Company: The company, during the year 1939 enjoyed its largest volume of business since the year 1937, realizing during that period \$65,381.05 of net profits from operations and before depreciation charges, representing the largest cash net income during many recent years included in its history of operation. Throughout the year, the company's condition became more sound and its net current position improved by approximately \$65,000.00. The improved condition of the corporation was accomplished even though, effective October 31, 1939, the management, after long negotiations, was compelled to grant an in-

(Testimony of Michael Maffei.)

crease in the wage scale for the majority of its employees, which will ultimately result in increased labor costs of approximately \$15,000.00 annually. This development, together with the existing high interest rate on its bonded and other indebtedness, greatly reduces the net cash profits being earned by the company. Constant progress is being made toward remedying these latter conditions.

As set forth in this and preceding Balance Sheets of your corporation, the investment in the controlling stock of Merchants Ice and Cold Storage Company constitutes your corporation's largest investment. Consequently, all steps which have been taken since the reorganization to date, have been pointed toward placing this investment on a dividend basis. It is the opinion of the management that, after the elapse of another year's operation, the financial condition of Merchants Ice and Cold Storage Company will be such as to permit the company to work out certain financial readjustments affecting its bonded indebtedness and capital structure, whereby the payment of dividends will be made possible consistent with the net income which may be realized. Your corporation should then profit materially.

Frostercraft Packing Corporation: The acquisition of a substantial interest in Frostercraft Packing Corporation was previously included in the Balance Sheet for the year 1938. This acquisition was prompted by the opinion of the management of your corporation than an entry into the production of

(Testimony of Michael Maffei.)

frosted foods was not only opportune from the standpoint of your corporation, but a constructive step in a field which should prove highly valuable and profitable to Merchants Ice and Cold Storage Company. The development of this corporation, during the year 1939, has reached the point whereby it is looked upon as one of the ten better nationally known companies producing and distributing frosted foods. While the company has not yet progressed sufficiently since its organization to produce profits, nevertheless, it has already proven itself to be a valuable tenant and customer to Merchants Ice and Cold Storage Company.

Other Holdings and Investments: During the year 1939 there were no changes in your corporation's holdings in the stock of Pacific Empire Corporation, the bank stock holding company, excepting, however, that during the year, Pacific Empire Corporation disposed of 280 shares of its holdings of the capital stock of Pacific National Bank of San Francisco. The proceeds of this sale were utilized for the purpose of making additional loans to Merchants Ice and Cold Storage Company and to reduce the corporation's obligations owing to banks. The corporation continues to carry in its investments substantial holdings in the stock of Pacific National Bank, as reflected by the accompanying Consolidated Balance Sheet.

The investment in the stock of California Pacific Service, Incorporated continues to prove extremely profitable. The corporation, which operates princi-

(Testimony of Michael Maffei.)

pally the Family Service Laundry at Bakersfield, California, enjoyed a gross volume of business for the year 1939 of \$96,502.43. As heretofore reported, the operation of these properties has netted your corporation attractive annual profits consistently, since the acquisition of the stock of that company.

General: During the year under discussion, total liabilities of the corporation have been reduced by \$53,581.82, including the reduction of \$37,563.00 of notes payable to banks. Also during the year, even further economies have been effected by the management in general administrative and operating expense, with the result that the total expenditures of the corporation and consolidated subsidiaries, other than interest paid on obligations, equalled \$8,633.20. This figure represents a further reduction of overhead costs including all administrative charges and executive salaries of \$4,517.95.

The management, during the year, negotiated the cancellation of the lease on the premises occupied by the corporation and the change in the location of their offices, which will result in an annual saving of \$4,110.00.

As evidenced by the accompanying Balance Sheet, the management continues to increase its holdings in the stock of Merchants Ice and Cold Storage Company whenever the occasion warrants, thus improving its equity position, accordingly. This policy prevails toward any investment of your corporation, whenever it is possible to increase its majority holdings.

(Testimony of Michael Maffei.)

In concluding the report covering the 1939 operation of the corporation, the management wishes to state that the condition of the corporation and its controlled operating companies, has been greatly improved during these recent years, and further, that its foundation is sound to the end that the stockholders should ultimately benefit therefrom.

Respectfully submitted,

BY ORDER OF THE BOARD OF
DIRECTORS,

M. MAFFEI,

President.

L. R. ARNOLD,

Executive Vice-President.

(Testimony of Michael Maffei.)

PACIFIC EMPIRE HOLDINGS
Incorporated

CONSOLIDATED BALANCE SHEET

as of December 31, 1939

After giving effect to adjustments to reflect the estimated fair or liquidating
value of all assets owned by the Company

Assets

Investments:	
Capital Stock of Pacific National Bank.....	\$ 82,176.65(A)
Preferred Stock of Merchants Ice and Cold Storage Company.....	123,456.66
Common Stock of Merchants Ice and Cold Storage Company.....	545,906.81(B)
Common Stock of Frostrcraft Packing Corporation.....	10,000.00(C)
Capital Stock of California Pacific Service, Inc.....	86,582.40(D)
Total Investments.....	<hr/> \$848,122.52
Cash on Hand and in Banks.....	6,677.89
Notes and Accounts Receivable, Less Reserve.....	33,387.26
Other Stock and Securities.....	10,197.85
Printing Plant; Furniture and Fixtures, Less Reserve for Depreciation.....	236.53
	<hr/>
	<hr/> \$898,622.05 <hr/>

(Testimony of Michael Maffei.)

Liabilities

Notes Payable, Banks.....	\$ 46,000.00 (E)
Other Notes Payable.....	14,880.00 (E)
Notes and Contracts Payable, Long Term Installment.....	56,858.20 (E)
Accounts Payable	14,145.45 (E)
Reserve for Contingencies.....	15,000.00 (F)
Reserve for State Franchise and Federal Income Taxes.....	410.59
Minority Stockholders Interest in Capital Stock of Subsidiary Corporations.....	123,335.33

Capital Stock and Surplus:

Capital Stock Authorized.....	5,000,000 Shares	
Capital Stock Issued.....	2,560,996 Shares	
Less: Treasury Stock.....	24,535 Shares	
Outstanding	2,536,461 Shares	249,834.73
Surplus, Capital (Consolidated)		378,157.75
		627,992.48
		<u>\$898,622.05</u>

(Testimony of Michael Maffei.)

- (A) Valuation based upon the value stated by the published statement of condition of Pacific National Bank of San Francisco, as of December 31, 1939.
- (B) Valuation based upon the value stated by the audited balance sheet of Merchants Ice and Cold Storage Company, as of December 31, 1939, as prepared and certified to by Messrs. John F. Forbes & Company, Certified Public Accountants, excepting 13,000 shares of stock, which are carried at \$2.50 per share.
- (C) The investment in the stock of Frostcraft Packing Corporation is carried at cost.
- (D) The capital stock of California Pacific Service, Inc., represents the ownership of all the business, properties and equipment of Family Service Laundry, located at Bakersfield, California, carried at the valuation placed on these properties and business as of August 1, 1935, by Messrs. Kelly & Son, Appraisers, Bakersfield, California, adjusted according to the balance sheet of the company as of December 31, 1939.
- (E) Represents mainly the balances owing on obligations previously contracted on account of claims settled by the present management. Also included therein are obligations totaling \$15,300.00 contracted on account of new acquisitions.

(Testimony of Michael Maffei.)

(F) This amount has been set aside from the Surplus Account under advice of Counsel, as a reserve for possible losses which may be realized by the corporation on account of claims pending against it for additional revenue stamp taxes, attributable to the acquisition, by foreclosure proceedings, of the laundry properties, during the year 1934.

Note: The Corporation is contingently liable to Messrs. Kohler & Chase on account of the lease on the premises occupied by the company and subsidiaries at 26 O'Farrell Street, San Francisco, California, and to the Pacific National Bank of San Francisco, for the amount of \$50,000.00, as Guarantor on notes of Merchants Ice and Cold Storage Company.

Certification

Board of Directors and Stockholders

Pacific Empire Holdings, Incorporated:

The foregoing Consolidated Balance Sheet of Pacific Empire Holdings, Incorporated and Subsidiaries, has been prepared by the undersigned in accordance with instructions, for the purpose of conveying to the Board of Directors and Stockholders, the fair valuation of the Corporation's investments, based upon the information available, as in the opinion of the undersigned, appears proper. All items included in the Balance Sheet have been stated at the estimated fair or liquidating value, in accordance with the comment included in the Statement.

(Testimony of Michael Maffei.)

Based upon the conditions herein set forth, and included in the foregoing Balance Sheet as of December 31, 1939, it is certified that in the opinion of the undersigned, the financial condition of Pacific Empire Holdings, Incorporated and Subsidiaries, is fairly and correctly reported.

A. A. HEER, JR.,
Treasurer

San Francisco,

June 15, 1940.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Plfs. Ex. No. 15. Filed 4-21-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

Mr. Scampini: Q. In Pacific Empire Holdings, Inc., you had created, had you not, a voting trust?

A. That is right.

Q. Sometime in the year 1936?

A. That is correct.

Q. And the voting trust was for the purpose of assuring the continued management and control of the company? A. That is right.

Q. You had issued to those who consented to the voting trust a voting trust certificate?

A. That is correct.

Q. I will now show you what appears to be a voting trust certificate for the common stock of the Pacific Empire Holdings, Inc., to Maurice L. Boulanger for 4100 shares, and ask you whether or not that is one of the voting trust certificates.

(Testimony of Michael Maffei.)

A. That is right.

Q. Among the voting trustees are the names of Mr. Bercut, yourself and Mr. Arnold?

A. Yes.

Mr. Naus: Will you have those statements which were given you marked for identification?

Mr. Scampini: Very well.

Balance sheet Merchants Ice & Cold Storage Co. of August 4, 1939, was marked "Plaintiff's Exhibit 16 for Identification."

(Balance sheet Merchants Ice & Cold Storage Co. of June 15, 1940, was marked "Plaintiff's Exhibit 17 for Identification.")

(Balance sheet of Merchants Ice & Cold Storage Co. of [140] February 19, 1942, was marked "Plaintiff's Exhibit 18 for Identification.")

(Balance sheet Merchants Ice & Cold Storage Co. of February 19, 1941, was marked "Plaintiff's Exhibit 19 for Identification.")

(Voting trust certificate for the common stock of Pacific Empire Holdings, Inc. was marked "Plaintiff's Exhibit 20.")

(Testimony of Michael Maffei.)

PLAINTIFF'S EXHIBIT No. 20

Number

10

Shares

—4,100—

VOTING TRUST CERTIFICATE
FOR THE COMMON STOCK

of

PACIFIC EMPIRE HOLDINGS
INCORPORATED

Incorporated Under the Laws of the
State of Delaware

This certifies that Maurice L. Boullanger has deposited Four Thousand One Hundred shares of the above named company, Pacific Empire Holdings, Incorporated, of the par value of Ten Cents (\$.10) each, with the Trustees, under an agreement between M. Maffei, L. R. Arnold, A. A. Heer, Jr., Peter Bercut, James Bernardini, Luigi Giachino and George W. Hope as Trustees, and certain stockholders of the said company, bearing date, the Second day of March, 1936. This certificate and interest represented thereby is transferable only on the books of said Trustees upon the presentation and surrender hereof. The holder of this certificate takes the same, subject to all of the terms and conditions of the aforesaid agreement between the Trustees and certain stockholders of said company, Pacific Empire Holdings, Incorporated, and becomes a party to the said agreement and is entitled to the benefits thereof.

(Testimony of Michael Maffei.)

In Witness Whereof, the Trustees have caused this certificate to be signed this Twentieth day of October, 1936, by the Signatory Trustees thereunto duly authorized.

M. MAFFEI

Trustee

L. R. ARNOLD

Trustee

For Value Received.....hereby sell, assign and transfer unto.....shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint.....attorney to transfer the said stock on the books of the within named Corporation with full power of substitution in the premises.

Dated.....

MAURICE L. BOULLANGER

In Presence of

A. A. HEER

Notice: The signature of this assignment must correspond with the name as written upon the face of the certificate, in every particular, without alteration or enlargement, or any change whatever.

[Endorsed]: U. S. D. C. N. D. Cal. No. 22339R.
Filed 4-21-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

(Testimony of Michael Maffei.)

Q. In Pacific Empire Corporation, in order to assure continued management you had caused to be solicited and obtained from the stockholders certain proxies, had you not? A. That is right?

Q. I show you here one of the proxies and ask you whether or not that is one of the proxies which was used in the course of soliciting the proxies and voting rights. A. That is right.

Q. I see that Mr. Maffei, Mr. Arnold and Mr. Bercut were the proxies named to vote the proxies of the stockholders. A. That is right.

Q. By means of these proxies you would manage and control the action of the board?

A. That is right.

Mr. Scampini: I offer in evidence the proxy as Plaintiff's Exhibit 21.

(The proxy was marked "Plaintiff's Exhibit 21.")

PLAINTIFF'S EXHIBIT No. 21

PROXY

PACIFIC EMPIRE CORPORATION

(A California Corporation)

Know All Men by These Presents, That the undersigned stockholder of Pacific Empire Corporation, a corporation, does hereby constitute and appoint M. Maffei, L. R. Arnold and Peter Bercut, and each of them, the true and lawful attorneys,

(Testimony of Michael Maffei.)

agents and proxies of the undersigned, with full power of substitution, for and in the name, place and stead of the undersigned, to vote the shares of Pacific Empire Corporation, a corporation, now or at any time held or owned by the undersigned or standing in the name of the undersigned on the books of said Corporation, at any annual or special meeting of the stockholders of said Corporation, and at any and all adjournments thereof, on any matter, resolution, motion, election or proposition coming before such meeting or adjournment thereof, of which may be submitted to, considered at or acted or passed upon by, such meeting, including election of directors, amendment of certificate of incorporation of by-laws, and any other corporate act requiring the authorization of stockholders, as fully as the undersigned could do if personally present and acting, hereby ratifying and confirming all that said attorneys, agents or proxies may do by virtue hereof.

A majority of all or any of said attorneys, agents and proxies who shall be present and shall act at the meeting (or if only one shall be present, then that one), shall have and may exercise all of the powers of said attorneys, agents and proxies hereunder.

All former proxies are hereby revoked, and this proxy shall continue in full force and effect for a period of three years from date.

(Testimony of Michael Maffei.)

In Witness Whereof: the undersigned has hereunto set his hand this 28th day of November, 1939.

HENRY J. BUDDE

Signature of Stockholder.

Signed in the presence of:

ERNEST O. JONES

Witness.

N. B. This proxy must be witnessed.

Henry J. Budde

45 Hartford St., S. F.

[Endorsed]: U. S. D. C. N. D. Cal. No. 22339R.
Filed 4-21-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

Q. What, if anything, happened to this block of stock of the Merchants Ice & Cold Storage Company, owned by the company, on November 20, 1940? A. It was sold to Mr. Bercut.

Q. When was it sold to Mr. Bercut?

A. Sometime in the last part of 1940.

Mr. Scampini: Mr. Brownstone, might I now ask that you produce the original agreement between Mr. Bercut and Pacific Empire Holdings, Inc., dealing with the purchase of these shares?

Mr. Brownstone: Yes.

Mr. Scampini: Counsel has just handed to me what purports [141] to be a letter addressed to Mr. Peter Bercut, 739 Market Street, San Francisco,

(Testimony of Michael Maffei.)

California, dated January 8, 1941, and I will ask you to look at it and ask you whether you remember it. It is signed by you as president and by Mr. Arnold as secretary. A. Yes.

Q. Did you ever see the other duplicate original of this letter? A. I never did.

Q. Do you know whether Mr. Bercut ever accepted the agreement? I do not see his signature there.

A. I don't know. After I signed it I never saw it afterward.

Q. You have never seen the original of this document after signing this?

A. Not after signing.

Q. Did you sign one, or two, or three?

A. I don't remember.

Q. But as far as you know have never been able to find in the office or the files a duplicate of this?

A. No, I never did.

Mr. Scampini: I now offer in evidence as our next exhibit in order a letter addressed to Mr. Peter Bercut under date of January 8, 1941, which purports to be signed by Pacific Empire Holdings, Inc., by M. Maffei, President, by L. R. Arnold as Secretary. In the left-hand corner it states: "Agreed and accepted," with a line for signature, and in typewriting, "Peter Bercut," but the signature of Peter Bercut apparently is not here. I will ask that it be marked "Plaintiff's Exhibit" next in order.

(Testimony of Michael Maffei.)

(The document was marked

“PLAINTIFF’S EXHIBIT 22.”)

Mr. Scampini: I now desire to read this into the record, may it please the Court. The letter appears to be on a plain letterhead. It is dated January 8, 1941:

“Mr. Peter Bercut
739 Market Street
San Francisco, California [142]

“Dear Mr. Bercut:

“The following will confirm our understanding and agreement relating to the sale to you by this corporation, Pacific Empire Holdings, Inc., of the controlling shares of stock of Merchants Ice & Cold Storage Company, now owned by this corporation.

“The purchase price, as agreed to be paid by Peter Bercut, is \$35,000.00, for which it is agreed that Peter Bercut is to receive, in accordance with the following conditions, the total of 78,358 shares of stock of Merchants Ice and Cold Storage Company, consisting of 12,495 shares of Preferred stock and 65,863 shares of Common stock.

“It is agreed by this corporation that out of the proceeds of this sale, to-wit, \$35,000.00, the sum of \$25,000.00 will be paid by this corporation to Merchants Ice and Cold Storage Company. Out of the balance remaining the sum of

(Testimony of Michael Maffei.)

\$6,000.00 is to be remitted to Pacific National Bank, in order to secure the release from them of all stock of Merchants Ice and Cold Storage Company now on pledge as security for the obligations of the corporation to Pacific National Bank.

“It is further understood and agreed that 5,516 $\frac{2}{3}$ shares of Preferred stock of Merchants Ice and Cold Storage Company, now held by California Baking Company as security for the balance owing by the corporation of \$4100.00 is to be delivered to Peter Bercut when this obligation is paid.

“It is understood and agreed by Peter Bercut that the corporation shall have the option to purchase, at 50¢ per share, all or any part of 20,000 shares of Common stock of Merchants Ice and Cold Storage Company within two years [143] from date hereof. It is understood that the corporation may obtain delivery of any portion of the 20,000 shares as paid for, from time to time, within the said two year period. It is further understood and agreed, in this connection, that all of the voting rights on the said 20,000 shares herein referred to shall remain with Peter Bercut for a period of seven years from date hereof, whether or not the said 20,000 shares are purchased by the corporation. All rights and privileges of Pacific Empire Holdings, Inc., in connection with the 20,000

(Testimony of Michael Maffei.)

shares of Common stock, hereinabove referred to are not assignable.

“Yours very truly,

“PACIFIC EMPIRE HOLDINGS,
INCORPORATED

[Seal] “By M. MAFFEI, Pres.

“By L. R. ARNOLD, Secy.

“Agreed and Accepted:

Peter Bercut.”

Q. Now, Mr. Maffei, this 65,863 shares of common stock and 12,495 shares of preferred stock, in the aggregate, were all of the shares owned by Pacific Empire Holdings, Inc., or any of its subsidiaries in Merchants Ice & Cold Storage Company? A. Right.

Q. Who conducted this transaction with Mr. Bercut? A. Mr. Arnold.

Q. What did you have to do with it?

A. Mr. Arnold was going to contact him and make a deal.

Q. Did you conduct negotiations with Mr. Bercut?

A. I talked to Mr. Bercut once in the office about three minutes, and that was all. [144]

Q. At that time was Mr. Bercut a director and vice-president of the Pacific Empire Holdings, Inc.?

A. Yes.

(Testimony of Michael Maffei.)

Q. Was he a director of Pacific Empire Corporation? A. To my best knowledge he was.

Q. Was he a director of Merchants Ice & Cold Storage Company? A. Yes.

Q. Was he a director of the Pacific National Bank? A. That is right.

Q. Now, out of the \$35,000 received, \$25,000 was given to the Merchants Ice & Cold Storage Company? A. Correct.

Q. And \$6000 went to the Pacific National Bank of San Francisco? A. That is right.

Q. There was \$4000 left. A. Yes.

Q. What did the Pacific Empire Holdings, Inc. have as assets after this transaction?

A. They did not have much of anything.

Q. To your knowledge, Mr. Maffei, were the liabilities of the Pacific Empire Holdings, Inc. substantially the same liabilities as are enumerated in the minute book on the balance sheet of December 31, 1939, which are enumerated on page 86, Volume 5 of the Minute Book of the Pacific Empire Holdings, Inc.?

A. I think the debts were higher than that.

Q. In other words, the liabilities had increased from December 31, 1939 to December 31, 1940?

A. Correct.

Q. And after this transaction was completed there was nothing much left in Pacific Empire Holdings, Inc.? A. That is right.

Q. Did you call any meeting of the Executive Committee to pass upon this transaction?

(Testimony of Michael Maffei.)

A. No.

Q. Did you call any meeting of the board of directors to pass on this transaction? A. No.

Q. I notice a call of stockholders' meeting for February 14, [145] 1941. Did you send out to the stockholders any letter for the purpose of the calling of this meeting? A. No.

Q. Did you ever advise the stockholders at any time thereafter of the sale of this block or stock?

A. Not to my knowledge.

Q. Did you ever advise the board of directors at any time thereafter of the sale of this stock?

A. Not to my knowledge.

Q. When was the next meeting of the board of directors called subsequent to the executive committee meeting of October 17, 1940, which appears to be the last meeting?

A. I think it was the last.

Q. When was the next ensuing directors' meeting of this company held subsequent to October 17, 1940?

A. I don't think there was any meeting.

Q. Was the last meeting held October 20, 1942, for the purpose of consenting to the appointment of a receiver of this company? A. In 1942?

Q. Yes. This appears to be in the minute book, here. A. That was the last meeting.

Q. Was there any meeting in between October 17th and this meeting?

A. Not that I remember.

(Testimony of Michael Maffei.)

Q. Were the directors ever given an opportunity to affirm the transaction? A. No.

Q. Were the stockholders ever given the opportunity to disaffirm or approve of this transaction?

A. No.

Q. You said that the executive committee was never called or never met as a body or as a committee for the purpose of determining the advisability of this transaction? A. No.

Q. The proposal of either Mr. Arnold or Mr. Bercut was never submitted to the executive committee meeting in any wise?

A. Not to my knowledge. [146]

Q. Now, at this time Mr. Arnold was president of the Merchants Ice & Cold Storage Company, was he not? A. At that time, yes.

Q. He was drawing a salary from the Merchants Ice & Cold Storage Company?

A. That is right.

Q. How much was he drawing, do you recall?

A. I don't recall the exact amount, whether it was \$500 or \$600 a month.

Q. Do you know whether or not Mr. Arnold was indebted to the Merchants Ice & Cold Storage Company at that time? A. I never knew.

Q. I will now ask you whether or not, Mr. Maffei, you ever discussed the proposed sale of this stock with anybody, with any of the creditors.

A. No.

(Testimony of Michael Maffei.)

Q. Now, at this time Kohler & Chase was a creditor of the company? A. Yes.

Q. How much did the company owe them?

A. Ten or eleven thousand dollars.

Q. You had pledged stock of the Pacific Empire as security for the indebtedness: is that right?

A. That is right.

Q. Isn't it true that Pacific Empire Holdings Company had been a tenant of Kohler & Chase for many years in San Francisco?

A. That is right.

Q. You had had numerous transactions with Kohler & Chase? A. Yes.

Q. Ordinarily with Mr. Chase? A. Yes.

Q. 'Isn't it true that in the course of those business transactions Mr. Chase had advised you on repeated occasions that if the company came to a point where the company had to dispose of the controlling interest in the Merchants Ice & Cold Storage Company stock he wanted to be consulted, and he wanted to be permitted to bid?

A. Yes, he had a little interest in it, once we [147] talked about it.

Q. Didn't he say so to you?

A. He wanted to look into the details.

Q. Did you submit it to him before you sold the stock to Mr. Bercut?

A. Not to my knowledge.

Q. Isn't it true during the course of years you had numerous transactions with Joseph McInerney?

A. Yes.

(Testimony of Michael Maffei.)

Q. You had borrowed thousands of dollars from him? A. Yes.

Q. And on numerous occasions Mr. McInerney told you that he would be interested in acquiring this block of stock of Merchants Ice & Cold Storage Company?

A. Yes, but he never made an offer.

Q. Did you submit it to him? A. No.

Q. It is true, is it not, Mr. Scampini was a creditor of this company at this time?

A. Right.

Q. And Mr. Scampini once in a while would call you on the phone as to whether he would be paid something on the note? A. Yes.

Q. Of course, you would not tell him they could not pay? A. Yes.

Q. And Mr. Scampini was not paid?

A. That is right.

Q. Isn't it true that Mr. Scampini told you, Mr. Maffei, that if the company had to sell a block of stock in the Merchants Ice & Cold Storage Company he had some client who wished to take it?

A. That I don't remember.

Q. Did you submit it to Mr. Scampini?

A. I did not, I never did.

Q. Did you consult Mr. Scampini on this sale?

A. I never did.

Q. When did you first consult Mr. Scampini with regard to this matter?

A. I never consulted him at all.

(Testimony of Michael Maffei.)

Q. At this time Mr. Will Morse was a director and chairman of the board of the Merchants Ice & Cold Storage Company, was he [148] not?

A. That is right.

Q. He had been, up to a couple of years before, president of the Bank of America?

A. He was.

Q. He was there on the board representing the bondholders, wasn't he?

A. Correct.

Q. And isn't it true that the holding company had just a few months prior to this transaction borrowed some \$3000 from Mr. Morse?

A. That is right.

Q. And given him as security 1500 shares of the common stock of the Merchants Ice & Cold Storage Company?

A. Correct.

Q. In other words, he loaned you \$3000 on 1500 shares of common stock of the Merchants Ice & Cold Storage Company?

A. That is right.

Q. Did you see fit to consult with Mr. Morse with respect to the advisability of this transaction with Mr. Bercut?

A. I did not get that.

Q. Did you ever consult with Mr. Morse at any time prior to this transaction with Mr. Bercut?

A. No.

Q. Did you at any time prior to the closing of the transaction with Mr. Bercut consult with Mr. Morse?

A. I never did.

Q. At that time you were still indebted to Mr. Morse?

A. Correct.

(Testimony of Michael Maffei.)

Q. Did you advise your attorneys that this block of stock was going to be sold by Mr. Arnold to Mr. Bercut?

A. No.

Q. Mr. Arnold and Mr. Bercut, I gather from what you said, conducted all of the negotiations in regard to this transaction?

A. I had something to do with it.

Q. What did you have to do with it?

A. He was going to consult me before doing so.

Q. You signed the letter, didn't you?

A. That is right. [149]

Q. At this time, Mr. Maffei, Mr. Ellis and Mr. Hubner were conducting the case in which a judgment had been obtained by the United States on November 20, 1940?

A. Yes.

Q. On a contingent basis?

A. That is right.

Q. Did you advise Mr. Ellis and Mr. Hubner of this transaction with Mr. Bercut?

A. No, I did not.

Q. You don't know whether Mr. Arnold did?

A. No.

Q. But you never did?

A. No.

Q. Did you make any effort, at all, to obtain a better price than Mr. Bercut submitted?

A. I never did.

Q. Who, if you know, placed the condition in the agreement or letter with respect to the option being not assignable, and in the event the company

(Testimony of Michael Maffei.)

would exercise it the voting rights would be in Mr. Bercut for seven years? A. Mr. Arnold.

Q. Mr. Arnold? A. Yes.

Q. As far as you know? A. Yes.

Q. Knowing the financial condition of Pacific Empire Holdings upon the consummation of this transaction, did you have any reasonable expectation of the company being able to exercise that option? A. No.

The Court: We will take a recess now until two o'clock.

(A recess was here taken until 2:00 o'clock p. m.)

[150]

Afternoon Session—April 21, 1943

2:00 o'clock P. M.

Mr. Scampini: With your Honor's permission and counsel's permission I would like to call out of order Mr. Chase, who is leaving town, and it is very important that I get his testimony into the record.

The Court: Very well.

GEORGE Q. CHASE,

called as a witness on behalf of plaintiffs; sworn.

Mr. Scampini: Q. You are, I assume, an officer of the firm known as Kohler & Chase?

A. Right.

Q. Which is a corporation? A. Yes.

Q. Kohler & Chase is the owner, and has been the owner, if I understand it correctly, of the building designated as 26 O'Farrell Street, San Francisco? A. Yes.

Q. How long have you owned that building?

A. We built the building back in 1910.

Q. Is it true or not that sometime in the year 1928, 1929, or 1930, or thereabouts, one of the tenants was the Associated Calitalo, Inc.?

A. Yes.

Q. Thereafter known as Pacific Empire Holdings, Inc.? A. Yes.

Q. Also tenants of the ground floor space were the City National Bank of San Francisco, was it not?

A. No, the tenants of the Calitalo or the Pacific Empire Holdings; they were a sub-tenant.

Q. City National Bank was a sub-tenant of Calitalo or the Pacific Empire Holdings, Inc.: Is that correct? A. Yes.

Q. In other words, as I understand your testimony, the Pacific Empire Holdings, Inc., or its predecessor, had a lease practically on the entire building for a period of time, did it not?

(Testimony of George Q. Chase.)

A. No. [151]

Q. Or for a large portion of it?

A. No, only the first three or four floors.

Q. Three or four floors, including the ground floor?

A. And the basement.

Q. How long did Pacific Empire Holdings continue to be a tenant of your building?

A. For a long period, I could not give you the date from memory on that, but I think from 1920 or prior to that, perhaps.

Q. And when did they cease being a tenant?

A. I believe sometime this year, or the latter part of last year.

Q. When the receiver was appointed, is that correct?

A. Yes, when the receiver was appointed.

Q. That is when the tenancy was terminated?

A. That is correct.

Q. Now, in the course of the relations between your firm and Pacific Empire Holdings, Inc., did you have any business transactions with them?

A. Yes.

Q. Running into very substantial sums, is that right?

A. Yes, amount due for rental.

Q. It is true, is it not, that sometime in the year 1933 or 1934 the original lease which comprised, as you say, the first three or four floors of the building, was cancelled by mutual consent upon settlement having been made agreeable to both parties?

Mr. Naus: I do not think he said three or four floors.

(Testimony of George Q. Chase.)

Mr. Scampini: What was it?

A. Three or four floors and the basement, I am not sure. You asked me as to the cancellation, I cannot give you that off-hand from memory, that was sometime ago. You represented them at the time, and you might refresh my memory.

Q. Sometime in the year 1934, and thereafter, a new lease was executed, was it not?

A. That is correct. [152]

Q. Which comprised a much smaller space?

A. That is correct.

Q. That lease continued right down to the time when it was again modified, was it not, sometime in 1937 or 1938?

A. Yes, it was again modified and they took less space.

Q. That continued until the receiver was appointed, when by mutual consent it was terminated?

A. That is correct.

Q. During the years 1938, 1939 and 1940, did the Pacific Empire Holdings, Inc. become indebted to your company for unpaid rent?

A. Yes, they were practically always indebted for back rent.

Q. Have you any record that would indicate how high that indebtedness reached at the end of 1940?

A. Toward the end of 1940, I have no records with me, but I can tell you it was between thirteen thousand and fifteen thousand dollars.

(Testimony of George Q. Chase.)

Q. Had they assigned you any collateral for the payment of this indebtedness?

A. Previous to that?

Q. Yes.

A. Yes, they assigned a note on the Merchants Ice & Cold Storage Company for \$10,000, and later that note was renewed for \$9500, and they had assigned previous to that other collateral at various times, and then later on they assigned us the total stock of the Pacific Empire Corporation.

Q. Sometime in the year 1942 did you find it necessary to sue the Pacific Empire Holdings, Inc. in San Francisco to enforce the collection of this rent?

A. I believe that an attorney did bring such a suit.

Q. Did you also bring an action against the Merchants Ice & Cold Storage Company to collect the promissory note that had been assigned to you, or endorsed over to you by Pacific Empire Holdings, Inc., by way of collateral for the payment of its obligation?

A. I believe that such a suit was filed.

Q. What did you ascertain to be the fact with respect to the [153] promissory note which had been assigned to you by Pacific Empire Holdings, Inc.?

Mr. Naus: Objected to as calling for hearsay, what he ascertained.

Mr. Scampini: The purpose of the testimony is to show that the promissory note which had been

(Testimony of George Q. Chase.)

assigned by Pacific Empire Holdings, Inc. through Mr. Arnold, as I will show by documentary evidence—the promissory note bears the date of October 10, 1940—purported to have been executed by Merchants Ice & Cold Storage Company, and signed by Mr. L. R. Arnold as president, and A. A. Heer, Secretary, when this note was assigned over to Kohler & Chase, and in the meantime suit having been filed, Mr. Chase discovered that the promissory note had been paid by Merchants Ice & Cold Storage Company to Pacific Empire Holdings, Inc., and that he never got the money.

Mr. Naus: Who never got the money?

Mr. Scampini: Mr. Chase.

Mr. Naus: As I understand it, Mr. Scampini, you are seeking to establish that Mr. Chase got a live note for \$9500 which was handed over by Mr. Arnold, and then later on, when he was trying to collect it, he found it was a dead note, and I will stipulate to that, that is the fact.

Mr. Scampini: Very well.

Q. When you discovered that Mr. Arnold had assigned to you a promissory note which, as counsel says, was a dead note instead of a live note, you made a demand for additional security, and that is when you got the Empire Pacific Corporation stock, is it? A. That is correct.

Q. Thereafter, the Empire Pacific Holdings, Inc. did not pay the note and you foreclosed on the pledge whereby the Pacific [154] Empire Corporation stock had been assigned over to you?

(Testimony of George Q. Chase.)

A. That is the idea.

Q. After you foreclosed on the pledge you went and examined the books of the Pacific Empire Corporation, didn't you?

A. Yes, through our representative we did.

Q. What did you find in Pacific Empire Corporation, Mr. Chase?

Mr. Naus: Are you asking the witness to say what the books of the Pacific Empire Corporation show?

Mr. Scampini: Yes.

Mr. Naus: Objected to as calling for hearsay, secondary evidence.

Mr. Scampini: Q. I will ask you what did you find, by way of assets, if any, in Pacific Empire Corporation when you made inquiry, after having foreclosed on this Empire stock?

Mr. Naus: The same objection, that is not the best evidence. I am not seeking to conceal the facts, but there is a better way to prove it.

Mr. Scampini: Q. Were you ever able to find any assets with which to pay the obligation of Pacific Empire Holdings, Inc. to Kohler & Chase?

A. No, we were not.

Q. Did the Referee, after having come into possession of the books and records and assets of the company, make arrangements with you whereby your claim was settled and compromised?

A. That is correct, it was paid off.

Q. Now, Mr. Chase, in the course of your busi-

(Testimony of George Q. Chase.)

ness relations with the Pacific Empire Holdings, Inc., with whom did you deal, primarily and principally?

A. In the last four or five years Mr. Arnold dealt with us primarily.

Q. Did you have any occasion to discuss with Mr. Arnold their holdings in Merchants Ice & Cold Storage Company during this [155] period of time?

A. Yes, because that was their principal asset.

Q. When did you first discuss it with Mr. Arnold, do you recall?

A. Well, the first time I discussed it with Mr. Arnold must have been back in the early thirties, sometime; I should imagine, but I discussed it with him from time to time up to the time that he made the deal.

Q. When was the last occasion that you discussed the Merchants Ice & Cold Storage Company holdings with him, if you recall?

A. That was after the deal was made, in February or March, 1941.

Q. Prior to making the deal that you have referred to, I assume you mean the deal with Bercut?

A. Yes.

Q. Prior to the making of this deal, which appears to have taken place on January 8, 1941, when was it that you last discussed with Mr. Arnold the Merchants Ice & Cold Storage stock which was held by the holding company?

(Testimony of George Q. Chase.)

A. I should say somewhere in the middle of 1940.

Q. What were the circumstances under which the discussion came up between you and Mr. Arnold?

A. We were discussing the finances of the holding company and the method of borrowing, and the method of dealing with the bank, and I was offering some suggestion to him about——

Mr. Naus: One moment. He is not asking for anything said to him.

Mr. Scampini: Q. Did you ever make any statement or indicate any desire on your part to Mr. Arnold, if it should ever be available, to take an interest in Merchants Ice & Cold Storage Company?

Mr. Naus: One moment. There is no foundation laid that any of the defendants Bercut were present, or that they were in [156] any way connected with any such conversation called for, and therefore it would be hearsay, out of their presence, not binding on any of them.

Mr. Scampini: Mr. Arnold is a party defendant, Mr. Bercut is an officer and director of the company, owning the stock, and the charge is based upon a fraudulent transaction by fiduciary trustees, and whatever statements were made which would clarify the situation out of the presence of Mr. Bercut are admissible for the purpose of disclosing the situation, and it would be admissible as to the defendant Arnold.

(Testimony of George Q. Chase.)

Mr. Naus: You will note that my objection was that it is not admissible as to the defendants Bercut. I hold no brief for the defendant Arnold. If counsel wants to have it admitted as to Arnold I have nothing more to say, but it is clearly against Mr. Arnold.

The Court: I will allow it to go in subject to your motion to strike, over your objection.

Mr. Scampini: Will you read the question?

(Question read by the reporter.)

Mr. Naus: I do not care, your Honor, to repeatedly interrupt with objections, I have sought to avoid it as much as possible. May it be understood that I will make objections to similar questions to any other conversation, leaving it open to me to make a motion to strike without having repeated the objection?

The Court: That will be understood.

A. Yes.

Mr. Scampini: Q. When, approximately, was this expression on your part communicated to Mr. Arnold?

A. A number of times, over a period of four or five years.

Q. Was any such expression communicated to Mr. Arnold at this [157] last meeting, which was after the middle of 1940?

A. I mentioned it to him sometime after the middle of 1940.

Q. What did you say to him, if you recall?

(Testimony of George Q. Chase.)

A. I told him that if the Merchants Ice & Cold Storage Company needed the money or the holding company needed money we would be glad to make a loan of the money to the Merchants Ice & Cold Storage Company, or we would be glad to make a deal, without going into details, for an interest in the Merchants Ice & Cold Storage Company.

Q. Did you ask for any information or any data concerning the financial condition of those companies from Mr. Arnold at this time?

A. I said that the more we knew about the operations of the Merchants Ice & Cold Storage Company the more intelligently we could consider the subject.

Q. What happened as a result of this conversation?

A. Well, Mr. Arnold gave me a statement of the profit and loss covering a period of four years, including 1939.

Q. Of Merchants Ice & Cold Storage Company?

A. Of Merchants Ice & Cold Storage Company, yes.

Q. Did you have occasion to study those statements, Mr. Chase?

A. Yes, I looked them over carefully.

Q. And from a study of the statement which he gave you did you arrive in your mind at a figure which you felt would be the reasonable value for that outstanding stock of Merchants Ice & Cold Storage Company?

(Testimony of George Q. Chase.)

Mr. Naus: Objected to as calling in part for secondary evidence of a writing or writings; I have not the slightest idea from the questions and answers so far what kind of paper or papers Mr. Arnold may have turned over, whether complete or incomplete, and, secondly, upon the ground that even though a statement was turned over and this witness studied it, this [158] witness has not yet been qualified by way of any foundation as to competency by way of an expert or otherwise to give evidence of value.

The Court: Both objections, I think, are good.

Mr. Scampini: Q. Mr. Chase, have you got with you the information or data that Mr. Arnold supplied you with? A. I have.

Q. Will you please produce it?

A. This is marked "Schedule expense," but—

Mr. Naus: There is nothing before the witness. He has only been asked to produce the paper.

Mr. Scampini: We now ask that the document which the witness has just turned over to me be marked Plaintiff's Exhibit next in order for identification.

The Court: It may be marked.

(The document was marked "Plaintiff's Exhibit 23 for Identification.")

Mr. Scampini: Q. Mr. Chase, you have handed over to me what appears to be Merchants Ice & Cold Storage Company Schedule of Expense, what starts out by saying, "Merchants Ice and Cold Stor-

(Testimony of George Q. Chase.)

age Company, Total Operating Revenue for 1936'' in one column, 1937 in another column, 1938 in another column, and 1939 in another column. In the year 1936 operating revenue was indicated to have been \$353,321.28, in 1937 it was indicated as \$437,023.65.

Mr. Naus: If your Honor please, that document was merely marked for identification so far. It certainly is not going into evidence in a left hand way by being read by Mr. Scampini. The letter is not in evidence.

Mr. Scampini: I am trying to ask a question.

Q. I will ask you whether or not you examined and studied this [159] statement which purports to be not only a schedule of operating expenses, but a schedule of operating expenses, administration expense, and net profit before depreciation.

A. I did.

Q. Did you have any other information besides this information available to you which you studied for the purpose of determining whether or not you would be interested in taking a position in Merchants Ice & Cold Storage Company?

A. From time to time I had various information from various sources as to its business.

Q. Now, when was it that you say you first ascertained that the shares owned by the holding company of Merchants Ice & Cold Storage Company had been disposed of?

A. I think it was February or March, 1941.

(Testimony of George Q. Chase.)

Q. Will you state the circumstances under which you ascertained that fact?

Mr. Naus: Does that question embrace something somebody said to him, Mr. Scampini?

Mr. Scampini: I don't know what the circumstances are.

Mr. Naus: In view of the refusal to answer, I object to the question as being in form, calling for hearsay out of the presence of the defendant Bercut——

The Court: Lay the foundation for it.

Mr. Scampini: Q. How did you ascertain that fact? A. I talked to Mr. Arnold.

Q. Will you state when and where?

A. In my office about February or March, 1941.

Q. What was the occasion for this meeting in your office?

A. Mr. Arnold came in to discuss some financial arrangement with regard to arranging security for rent.

Q. What did you say to him and what did he say to you with regard [160] to Merchants Ice & Cold Storage Company?

Mr. Naus: Objected to as calling for hearsay as to the defendants Bercut.

The Court: I will allow it subject to the same motion.

A. Mr. Arnold said that he had made a deal disposing of the interest in the holding company in the

(Testimony of George Q. Chase.)

Merchants Ice & Cold Storage Company, except a small amount which they had retained.

Mr. Scampini: Q. Which they had retained?

A. Yes.

Q. Did he tell you how much they had retained?

A. He did.

Q. What did he say?

A. I don't recall the exact amount.

Q. Did he tell you to whom it had been disposed of?

A. Yes, he did.

Q. What was the name mentioned?

A. Peter Bercut.

Q. Did he tell you the price for which it was disposed of?

A. He did.

Q. What was the consideration that he told you?

A. I think he said it was \$35,000.

Q. What did you say to him?

A. I asked him why they made such a deal as that.

Q. What did he say to you?

A. He said they were in a jam and on the spot, and they had to do something quickly.

Q. What did you say to Mr. Arnold with regard to the consideration or price that was paid?

A. I don't know whether I said anything to him about that, except that I was astounded that they had made a deal of that character, and I reminded him that I had offered to take an interest in the Merchants Ice & Cold Storage Company, or to loan them money, and I could not see why they needed to make a deal of that character.

(Testimony of George Q. Chase.)

Q. Did he make any reply to that statement?

A. All he replied was that he remembered that I had done that, that I had made this [161] offer, and that apparently was not in his mind, they were on the spot, they were in a jam and had to make some kind of a deal quickly, and that was the only thing he could do.

Q. Did you ever have any discussion with Mr. Maffei with regard to the Merchants Ice & Cold Storage Company? A. I probably did.

Q. Do you recall when?

A. Very much earlier than that.

Q. You did not have any in 1940?

A. No.

Q. Did you ever have any with Mr. Maffei subsequent to the conversation that you have just testified to as having had with Mr. Arnold?

A. I did not.

Q. Now, Mr. Chase, do you know how many shares of common stock of Merchants Ice & Cold Storage Company the Pacific Empire Holdings, Inc. held at the time that you had your conversation with Mr. Arnold, which was after the middle of 1940, prior to the making of the deal?

A. I did know, because it was on the statement of the Empire Holdings that was submitted to me. I have not the figures in mind.

Q. Have you any idea as to the reasonable value on or about the end of 1940 of 65,863 shares of common stock out of a total of 107,180 shares outstand-

(Testimony of George Q. Chase.)

ing, and 12,495 shares of preferred out of a total of 41,615 shares outstanding?

Mr. Naus: I object to that as immaterial, whether this witness had any idea upon the subject or not, and upon the further ground that no foundation whatever has been laid to qualify him to testify to that.

Mr. Pardini: I join in that objection on behalf of the defendants Arnold and Maffei.

The Court: The objection will have to be sustained. The foundation has to be laid. [162]

Mr. Scampini: Q. In your discussion with Mr. Arnold did you ever indicate to Mr. Arnold to what extent or what your offer would be, or how much you would be prepared to pay for a block of stock in Merchants Ice & Cold Storage Company?

Mr. Naus: At what time?

Mr. Scampini: Q. At any time prior to December, 1940.

A. No definite offer of any specific amount was discussed at any time.

Q. You merely asked him to supply you with the data, in case he was thinking of selling it, you would be willing to discuss it with him?

A. I said after we had the information, authentic information about the stock and about the condition, that we would be in a position to make an offer and would be prepared to do business if an occasion arose in which it was deemed advisable for the stock to be sold.

(Testimony of George Q. Chase.)

Q. Were you ever given an opportunity to make any offer? A. No.

Mr. Scampini: That is all.

Mr. Naus: If your Honor please, there was certain evidence received subject to a motion to strike. Is it your desire to take that up now, or at the conclusion of the whole case?

The Court: At the conclusion of the whole case.

Mr. Naus: Then we can pass it now without prejudice to our rights?

The Court: Yes.

Mr. Naus: Mr. Scampini, would you be good enough to have that note marked for identification?

Mr. Scampini: Let us see if we can establish this.

Q. Mr. Chase, I will show you here a note in the principal sum of \$9500, dated October 10, 1940, which appears to have been [163] executed by Merchants Ice & Cold Storage Company, by L. R. Arnold, President, and A. A. Heer, Jr., Secretary, and endorsed over by Pacific Empire Holdings, Inc., by Mr. Maffei, President, and by L. R. Arnold, Secretary, and ask you if this is the note which was given to you in lieu of the original note of \$10,000, and which subsequently you found to be a dead note, as you have testified? A. I think it is.

Q. That note was given you? A. Yes.

Mr. Naus: Can we have the Clerk mark it?

Mr. Scampini: I will offer this in evidence, may it please the Court, as our next exhibit in order.

The Court: It may be admitted and marked.

(Testimony of George Q. Chase.)

(The document referred to was marked "Plaintiff's Exhibit 24.")

Mr. Scampini: Q. That note which has just gone into evidence as Plaintiff's Exhibit 24 was given to you as collateral security for the payment of the promissory note of the Pacific Empire Holdings, Inc., to Kohler & Chase, dated October 10, 1940, in the principal sum of \$13,308.93: Is that right? A. That is correct.

Q. That was the amount of the rent due to you at that time?

A. The amount of rent and interest, or whatever else they owed us at the time.

Q. When you accepted that note as collateral you did not know at the time that it was a dead note, did you? A. No, I did not.

Q. You reasonably assumed it to be a valid note?

A. I assumed it to be a perfectly valid note.

Mr. Scampini: I offer in evidence this promissory note of the Pacific Empire Holdings, Inc., dated October 10, 1940, and ask that it be marked as our exhibit next in order. [164]

The Court: It may be admitted and marked.

(The document referred to was marked "Plaintiff's Exhibit 25.")

Mr. Scampini: That is all.

Cross Examination

Mr. Brownstone: Q. Mr. Chase, you are an officer of Kohler & Chase? A. Yes.

(Testimony of George Q. Chase.)

Q. What officer? A. President.

Q. You are a large stockholder of that corporation? A. Yes.

Q. How many directors are there in the corporation? A. Five.

Q. You are the president. Are the directors related to you? A. Yes.

Q. So that Kohler & Chase Corporation in essence is your corporation?

A. Myself and my sister.

Q. Do Kohler & Chase own the building at 26 O'Farrell Street? A. Yes.

Q. Now, when was that building first occupied by the Associated Calitalo Holdings?

A. I don't remember the date, but it was quite a few years ago.

Q. Was the first tenant in the chain of these corporations the Brotherhood Investment Company?

A. I could not answer that. I think it was in connection with the Brotherhood corporation, they had a number of them.

Q. One of these corporations signed a lease with your firm covering the lower three or four floors of this building, is that correct? A. Yes.

Q. It executed a sub-lease to a bank, or you consented to that sub-lease, I assume?

A. I presume it was a sub-lease to the bank at the time, but I could not say positively of my own knowledge. [165]

(Testimony of George Q. Chase.)

Q. But it is a fact, is it not, that either the tenant or the sub-tenant spent a very substantial amount of money installing safe deposit vaults in those premises? A. They apparently did.

Q. Do you know how much money was spent in the installation of those safe deposit vaults?

A. I don't recall exactly, but it was considerable; I know that the doors cost fifteen thousand or sixteen thousand dollars.

Q. So that a very substantial amount of money was spent at one time in improving these premises?

A. That is right, by one of the Brotherhood corporations.

Q. Either the Brotherhood corporation or the successor corporation continued in the occupancy of these premises until 1933 or 1934, is that correct?

A. The dates are not in my mind, I have not had occasion to look them up.

Q. What is your best recollection?

A. The best of my recollection is that is about it.

Q. What were the rentals payable under the terms of the lease under which these premises were occupied? A. By which tenant?

Q. You testified, Mr. Chase, that there was a lease to Associated Calitalo Holdings in 1932 or 1933, we will say, and that they had as a sub-tenant a bank. What was the rental under the terms of the lease to your tenants?

A. Well, there were different tenants and differ-

(Testimony of George Q. Chase.)

ent times, I don't know the time and tenant you are referring to.

Q. In 1932, Mr. Chase, it is correct, is it not——

A. (interrupting) I could not give you those dates, I told you I did not have them in mind.

Q. So that you don't know who was occupying those premises in 1932?

A. I don't know exactly which corporation was paying rent. [166]

The Court: He said he could not fix the time.

Mr. Brownstone: Q. At any rate, you testified on direct examination that in 1932, 1933 or 1934 an agreement was entered into by and between yourself and Calitalo Holdings by which the lease then in force on the premises was canceled and a new lease was entered into.

A. I said at that time as near as my memory could state.

Q. Without confining yourself to any particular date on or about that time such a transaction was entered into?

A. Yes, there was a change in the lease.

Q. What consideration did you receive at that time for the making of that new agreement?

A. We received no consideration for the making of the new agreement. We got a consideration for cancelling the old one.

Q. What was the consideration for the cancelling of the old lease?

A. Once again, that is a complicated matter; I

(Testimony of George Q. Chase.)

would be very glad, if the Court wishes, to bring the agreement here. It took in many details, and it is quite complicated. I presume, if you wish me to tell you this, what counsel is driving at was that in that agreement their equity in the safe deposit vaults came as a part of the consideration for the cancellation of the lease.

The Court: Is that what you had in mind?

Mr. Brownstone: Q. That is one of the things. In other words the money consideration for the lease was the equity in those safe deposit vaults?

A. The safe deposit vaults as they stood at that time had apparently small value, but the doors and boxes, themselves, could be moved.

Mr. Brownstone: I move to strike that out.

The Court: It may go out. [167]

Mr. Brownstone: Q. Mr. Chase, after the cancellation of his original lease was any indebtedness due you from either Associated Calitalo Holdings or that same corporation under the name of Pacific Empire Holdings, Inc., immediately after the cancellation?

A. You mean before the cancellation?

Q. Yes. A. I believe not.

Q. Thereafter, was the rent paid by the Pacific Empire Holdings, Inc. from month to month to your firm?

A. If the Pacific Empire Holdings came into existence then and took over the lease then that would be correct. .

(Testimony of George Q. Chase.)

Q. You have testified that on or about the end of 1940 there was an indebtedness of approximately \$13,000 to \$15,000 to your firm of the Pacific Empire Holdings; is that correct? A. Yes.

Q. During what period had that indebtedness arisen?

A. I don't know what period that covered, but it covered a considerable period, and they continued to fall behind in their rent in various amounts, they did not pay the full amount, and it had been running for some time.

Q. At or about the end of 1940 there was in the neighborhood of from thirteen thousand to fifteen thousand rent due?

A. Between those figures.

Q. At that time did you take a note of the company for that indebtedness?

A. At that time?

Q. Yes.

A. We took a note that is in evidence, here.

Q. Is that the first note?

A. Of \$13,000 and something. I don't know just the date of that, but we had this note or other notes.

Q. Mr. Chase, I will show you a document which has been marked Plaintiff's Exhibit 25, which purports to be a note of October 10, 1940, executed by Pacific Empire Holdings, Inc., in favor [168] of Kohler & Chase, in the sum of \$13,308.93. Is that the first note you took for the indebtedness?

A. I do not believe so, I think that was the renewal note.

(Testimony of George Q. Chase.)

Q. Now, were the notes previously executed secured?

A. Yes; that is, you say "the notes." I don't know whether there were notes, or a note, it depends how far you go back; there were a number of notes going back some years.

Q. Let us see if we can get at it this way: Was this note for which this note Exhibit 25 was given as a renewal secured?

A. Yes.

Q. What was the security for that note?

A. The security that we had on that note was, as I recall, a ten thousand dollar note of the Merchants Ice & Cold Storage Company.

Q. Was there any other security?

A. I do not think there was.

Q. When this note was executed you testified that it was secured by a note of the Merchants Ice & Cold Storage Company dated October 10, 1940, for \$9500 in favor of Pacific Empire Holdings, Inc., and endorsed over to your corporation.

A. The renewal note of \$9500 instead of ten thousand.

Q. Was that note of October 10, 1942, of the Holding Company to you also secured by a pledge of any shares of stock in Pacific Empire Corporation?

A. I believe not at the time this note was drawn.

Q. All right. When was the first occasion on which shares of Pacific Empire Corporation were pledged as security for this note?

(Testimony of George Q. Chase.)

A. They were not pledged as security for the note of the Merchants Ice & Cold Storage Company, they were pledged as security for the note of the Pacific Empire Holdings.

Q. Let me reframe the question: When was the first occasion on which shares of Pacific Empire Corporation stock were pledged [169] to your corporation, Kohler & Chase, as security for the payment of the note dated October 10, 1940, in favor of your corporation, executed by Pacific Empire Holdings, Inc., and marked Exhibit 25?

A. It is possible I can give you that date if I may refresh my memory from some notes I have.

Q. You may.

A. In either April or May, 1941.

Q. With whom did you deal in order to secure a pledge of your note in 1941?

A. Mr. Arnold.

Q. Did you demand of Mr. Arnold that he furnish you additional security? A. Yes.

Q. At the time that you demanded additional security——

A. (interrupting) Additional security, we had no security when I demanded security, that is, what we considered as no security. I would like to explain that additional part of it, if you want it.

Q. In April or May, 1941, Mr. Chase, had you filed suit on this note, Plaintiff's Exhibit 25, against the Pacific Empire Holdings, Inc.?

A. That is the date that I have not here. I don't know what date the suit was filed by the attorney.

(Testimony of George Q. Chase.)

Q. Do you know whether or not at or about that time you had filed suit on the note of the Merchants Ice & Cold Storage Company which was pledged to you?

A. I testified, I think, that suit was brought by our attorney.

Q. You don't know when these suits were brought on behalf of your corporation?

A. I could not tell you the dates on which these suits were brought.

Q. In any event, you discovered this note of the Merchants Ice & Cold Storage Company, Plaintiff's Exhibit 24, was not an enforceable note, and as a result of that you demanded additional security?

A. ' Mr. Bercut gave me information that the note was [170] not a valid note, and that was the first information I had, and that was about the middle of April, about April 15, 1941. That is the first intimation I had the note was not a valid note.

Q. You say Mr. Arnold pledged the stock of the Pacific Empire Corporation with you, or your corporation.

A. Of the Pacific Empire Corporation, that is the controlling stock of the Pacific Empire Corporation.

Q. When did you foreclose that pledge?

A. There, again, I cannot give you the date, but it occurred after that sometime.

Q. At a later date you foreclosed that pledge?

A. Yes.

(Testimony of George Q. Chase.)

The Court: Foreclosed on what?

Mr. Brownstone: On Pacific Empire Corporation stock.

A. On controlling stock of the Pacific Empire Corporation.

Q. Did your corporation ever purchase any stock of the Merchants Ice & Cold Storage Company, preferred or common? A. No.

Q. Did you ever purchase any of the bonds?

A. No.

Q. Did you ever personally purchase any stock or bonds of the Merchants Ice & Cold Storage Company? A. No.

Q. Have you ever seen a balance sheet of the Merchants Ice & Cold Storage Company?

A. I think I have seen several balance sheets.

Q. You have produced a copy of a schedule of expenses which was furnished to you, according to your testimony, by Mr. Arnold, which has been marked Plaintiff's Exhibit 23 for Identification. At the time that he delivered this schedule to you——

A. That is not a schedule of expenses, although it is headed that. It is a statement of the expenses and profits.

Q. At the time that this statement was handed to you was any other document or documents given to you by Mr. Arnold relating to Merchants Ice & Cold Storage Company?

A. There were other [171] documents given to me, and I have them here, together with a letter to

(Testimony of George Q. Chase.)

Mr. Arnold; whether they came with this, or not, I don't know, but his letter to me is dated April 18, 1941.

Q. So that this letter you received from Mr. Bercut was subsequent to the purchase made by Mr. Bercut of these shares?

A. That is correct.

Q. So that the information furnished you prior to April, 1941, by Mr. Arnold consisted of this paper?

A. I could not tie this up with that date, because I had in 1940—not in 1941—I can say that this did not come in 1941 with this because now I realize that this is 1941—I know that was 1940.

Q. In other words, this was given to you in 1940?

A. As I recall, in the middle or last half of 1940.

Q. At the time Mr. Arnold gave you this in 1940 did he give you any other document?

A. Not that I recall.

Q. So that the information that you had with respect to Merchants Ice & Cold Storage Company furnished you by Mr. Arnold was this statement?

The Court: Identify it.

Mr. Brownstone: Plaintiff's Exhibit 23.

A. I would say no, I had considerable information, verbal and documentary, from Mr. Arnold previous to that at various times. In other words, I had received considerable information from Mr. Arnold.

(Testimony of George Q. Chase.)

Q. I will reframe my question: At the time Mr. Arnold furnished you with this statement, Plaintiff's Exhibit 23 for Identification, this is the only document he furnished you with?

A. So far as my recollection goes.

Mr. Brownstone: That is all. [172]

Redirect Examination

Mr. Scampini: Q. So that the record may be clear, I think I should ask Mr. Chase, in fairness to him, this question: When Mr. Wingate was appointed receiver of the Pacific Empire Holdings, Inc., Mr. Wingate, acting through his agent, Mr. Prince, as you have testified, compromised the claim which you had against the Holdings Company?

A. Yes.

Q. Although you had foreclosed on the pledge of the Pacific Empire Corporation, you returned all of the stock to the receiver, did you not?

A. Yes.

Q. By delivery to his agent, Mr. Prince?

A. That is right.

Mr. Scampini: That is all.

Mr. Brownstone: No further questions.

MICHAEL MAFFEI,

recalled:

Direct Examination

(resumed)

Mr. Scampini: Q. Mr. Maffei, I ask you to take a look at a document which appears to be dated March 31, 1940, and ask you if you have ever seen that letter before? Did you ever see that letter before?

A. That is the first time I have seen it.

Mr. Naus: I ask that it be marked for identification.

Mr. Scampini: It may be marked for identification.

(Letter of Peter Bercut to Pacific Empire Holdings dated March 31, 1940, was marked "Plaintiff's Exhibit 26 for Identification.")

Mr. Scampini: Q. When were you first advised of Mr. Bercut's resignation, if at all?

A. Just about a week or two after the deal was made.

Q. Who advised you of his resignation?

A. Mr. Arnold. [173]

Q. What did he say to you?

Mr. Naus: One moment, objected to as calling for hearsay, out of the presence of the defendants Bercut.

The Court: I will allow it to go in subject to the motion to strike, over the objection.

Mr. Scampini: Q. What did he say to you?

(Testimony of Michael Maffei.)

A. He said he had resigned from the corporation, and that he had the girl in the office date back the resignation two or three weeks.

Q. Date the resignation back? A. Yes.

Q. Did you see the original of this document, yourself? A. I did not see it.

Mr. Scampini: If your Honor please, I desire to call your Honor's attention to the pleadings wherein and whereby the answer of the defendant Bercut denies that he was a director or state substantially that he ceased being a director along about March 30, 1940, and thereafter interrogatories were propounded to the defendant, which interrogatories are on file, and in his answers to the interrogatories the defendant admits the execution or signing by him of a letter of resignation dated March 30, 1940, but admits having signed the said letter on or about January 8, 1941.

Mr. Naus: Is that the way you read it?

Mr. Scampini: Shall I read the questions and answers?

Mr. Naus: I think it would be better.

Mr. Scampini: In the answer filed by Peter Bercut, Ernest E. Bercut, Henri Bercut and Jean Bercut in this proceeding on December 17, 1942, the following allegation appears. This is page 5 of the answer, paragraph V:

"Answering the allegations of paragraph thereof"— [174]

(Testimony of Michael Maffei.)

that is paragraph VII of the complaint——

“these answering defendants deny generally and specifically, each and every, all and singular, the said allegations. Further answering said allegations, these answering defendants allege that on or about December 31, 1940 the Board of Directors of Pacific Empire Holdings, Inc. consisted of six directors, namely, M. Maffei, A. A. Heer, Jr., L. R. Arnold, Luigi Giachini, Webb Richards, and T. M. Ryerson, and at said time the said corporation had an Executive Committee composed of two members, namely, M. Maffei and L. R. Arnold.”

Thereafter interrogatories were propounded to the defendant Peter Bercut, and Interrogatory 2, subdivision (a) was:

“State whether or not the document, a copy of which is attached to the deposition of L. R. Arnold as Plaintiff’s Exhibit No. 4, and which document purports to be your resignation as an officer and director of Pacific Empire Holdings, Inc., was signed by you on the date it purports to bear, namely, March 31, 1940?”

Will you stipulate, Mr. Brownstone, that the document attached to the deposition of Mr. Arnold is the document which has now been marked for identification?

Mr. Naus: I would rather have the deposition be produced so that the Court can know what we are talking about.

(Testimony of Michael Maffei.)

Mr. Scampini: The deposition of Mr. Arnold is here. Mr. Brownstone knows the situation.

Mr. Naus: Is that the exhibit which was marked at the deposition of Mr. Arnold?

Mr. Scampini: It was lost and thereafter found, and a copy substituted. This document was lost and later found.

Mr. Naus: Is that based on the evidence in the case? Who [175] lost it?

Mr. Scampini: The reporter. In the deposition there is a stipulation between Mr. Hubner and Mr. Brownstone that we might substitute a copy, is that right?

Mr. Brownstone: Yes.

Mr. Scampini: And this is the copy which was exhibited to Mr. Arnold.

Mr. Brownstone: I don't know whether it was in the deposition when it was filed. This document was apparently lost after the deposition was taken, and I don't know whether or not it was attached to the deposition when it was filed. As it is produced by Mr. Scampini, apparently it was not attached to the deposition.

Mr. Scampini: Mr. Brownstone, you will distinctly recall that I called you up and said, "The lost has been found, we found that document," and you said, "I am glad you found the original," but we substituted with the consent of you and Mr. Hubner a copy of this resignation in the deposition of Mr. Arnold.

(Testimony of Michael Maffei.)

Mr. Naus: If your Honor please, there is no dispute about its being the same document, but there is some suggestion about losing evidence, and I wanted to clear up about his losing and finding evidence, so that it could not appear that there was anything being thrown at us.

Mr. Brownstone: I am not trying to do anything of that character. It was lost in transcribing the deposition, and when counsel came back we found it had been mislaid in one of the many files.

Now, in answer to Interrogatory 1 the defendant states:

“Defendant admits that the original document, copy of which is attached as Plaintiff’s Exhibit 4 to the de- [176] position of L. R. Arnold, was signed by him and delivered by him to L. R. Arnold.”

That is the document which is dated March 31, 1940 and marked for identification for the present. I will offer it later when Mr. Arnold’s deposition is offered. In answer to Interrogatory 2(b):

“If your answer to the foregoing question is in the negative, please state on what date the said document was signed by you.”

And the answer is:

“To the best of this answering defendant’s knowledge the document was signed on or about January 8, 1941.”

The Court: That is the testimony of whom?

(Testimony of Michael Maffei.)

Mr. Scampini: That is the answer of Mr. Peter Bercut on his interrogatories.

The Court: And this witness testified what?

Mr. Scampini: This witness' testimony was that the resignation was a week or two after the sale of the stock to Bercut, at which time Arnold told him——

The Court: Did the witness say anything about dates?

Mr. Scampini: Did you say anything about the dates on your direct examination?

A. No. The only thing I said was that Mr. Bercut asked the secretary to, I think he wanted the date of resignation dated back a week or two.

Q. He wanted to date it back?

A. He wanted it dated back.

The Court: The testimony was it was dated back. I wanted to get it straightened out.

Mr. Scampini: Q. When was it that Mr. Arnold first told you of having received Mr. Bercut's resignation? A. About a week after the deal. [177]

Q. What else did he say to you with regard to the drafting of the resignation?

A. The only thing he said was that Mr. Bercut wanted the secretary to date it back two or three weeks.

Q. But as a matter of fact it was dated back to March 31, 1940?

A. I didn't see it, I don't know.

Q. You were not present when that was done?

A. No.

(Testimony of Michael Maffei.)

Q. Who was the secretary at the time?

A. Miss Keener.

Mr. Scampini: This morning I said, and Mr. Maffei said also, that he had never seen a duplicate original of the agreement dated January 8, 1941, between Pacific Empire Holdings, Inc. and Peter Bercut, and I have never seen a duplicate original, but I will say that in the files when we took over the books and records we did find what appears to be a second copy unexecuted by any party, and this second copy is the basis of our exhibit to the complaint, and was also used by us in taking the deposition of Mr. Arnold. I wish that fact to be disclosed.

Q. 'I will ask you, Mr. Maffei, whether in the files of the company you ever saw this copy of the agreement with Mr. Bercut.

A. This is the first time I have seen this one.

Mr. Naus: Will you mark what "this one" is?

Mr. Scampini: The agreement that I just showed you, being the agreement dated January 8, 1941, addressed to Mr. Peter Bercut, and which appears to be a typewritten copy of Plaintiff's Exhibit 22, you say this is the first time you have seen the copy?

A. Yes.

Mr. Naus: You mean the first time he has seen the carbon?

Mr. Scampini: Yes.

Mr. Naus: I understand he signed the original.

Mr. Scampini: That is right.

(Testimony of Michael Maffei.)

Q. You do admit having signed Plaintiff's Exhibit 22? [178] A. I signed it.

Mr. Scampini: I offer in evidence as Plaintiff's Exhibit next in order the office copy which I have used for the purpose of taking the deposition of Mr. Arnold; it is now marked plaintiff's exhibit for identification.

The Court: Dated when?

Mr. Scampini: Dated January 8, 1941, being a carbon copy of the agreement with Mr. Bercut.

The Court: It may be admitted and marked.

(The copy of the document referred to was marked "Plaintiff's Exhibit 27.")

Mr. Scampini: Q. Was the resignation of Mr. Bercut ever presented to the board of directors for its acceptance? A. It never was.

Q. Mr. Maffei, I will show you book V of the minutes of the directors' meeting of August 20, 1942, which appears to bear your signature, Mr. Maffei, at the bottom of that. Is that your signature? A. Yes, that is my signature.

Q. You state here——

Mr. Naus: You say he states there. I would like to have you hand that up to his Honor and let him see it. If your Honor please, you can see apparently that these are some minutes that have been prepared for a meeting that was to be held, with blanks to be filled in afterwards. It is true that they recite this, that and the other; it might or

(Testimony of Michael Maffei.)

might not have been presented at the meeting, the blanks have been filled in afterwards as to this, that and the other thing, but we have no showing that these things actually, physically occurred by way of conversation at a meeting.

Mr. Scampini: Q. Will you please read the minutes of that [179] meeting, Mr. Maffei, and state whether or not it refreshes your memory with regard to the resignation of Mr. Bercut?

A. This is the meeting we had.

Q. It is the first meeting you had after the transaction of Mr. Bercut of January 8, 1940, took place?

A. That is correct.

Q. That is when his resignation was accepted?

A. That is correct.

Mr. Scampini: You may take the witness.

The Court: We will take a recess.

(Recess.)

Cross Examination

Mr. Naus: Q. Mr. Maffei, I also hand you the Holding Company minutes of August 20, 1942, or purporting to be of that date.

A. Yes.

Q. Who wrote them up?

A. I don't know who wrote them up, I suppose Mr. Arnold wrote them up, or the bookkeeper.

Mr. Scampini: May it please the Court, I will gladly stipulate with counsel——

Mr. Naus: Just a minute, we will come to that. I think I know what the fact is.

Q. You started to answer you supposed. Now,

(Testimony of Michael Maffei.)

in order that we may understand each other, let us not do any supposing. Who wrote them up?

A. I don't know.

Q. When did you first see them?

A. When I seen them?

Q. When was that?

A. I could not exactly say when, but it was after the meeting was held.

Q. You have no recollection? A. No.

Q. I notice there are some other signatures at the end of them. Were you present when anybody else signed them?

A. There was not when I signed. [180]

Q. Were you present when anybody else signed them?

A. When I signed them I was just by myself.

Q. That is not my question. I did not ask you whether anybody else was present when you signed. I am asking whether you were present when anybody else signed. A. I don't remember.

Q. Now, can you tell me whether or not that last signature on there—what is that name?

A. Mr. Giachini.

Q. Can you tell me whether or not that signature has been put on there since these minutes were used in Mr. Arnold's deposition in September of 1942? Could you tell me that?

A. I couldn't tell you.

Q. To make it clear, you recall, do you not, that Mr. Arnold's deposition was taken last September?

A. Right.

(Testimony of Michael Maffei.)

Q. In September, 1942?

A. That is right.

Q. You are not prepared to tell me right now whether Mr. Giachini's signature was on these minutes when Mr. Arnold's deposition was taken, is that correct?

A. I couldn't tell you yes or no.

Q. Now, will you look through the minutes. You will notice places where there are two different—apparently two different typewritings, one heavier than the other, and that the heavier typewriting is filled in by way of filling in blanks. You see that, don't you?

A. Well, to me it looks all alike.

Q. It looks all alike to you?

A. Yes.

Q. 'Can you tell me whether or not, and without regard to when the minutes were signed, whether the minutes were written before the purported meeting which they attempt to record?

A. I couldn't answer that.

Q. You don't know one way or the other?

A. I don't know.

Q. Please let me finish: You don't know one way or the other whether the minutes were written before or after?

A. Right. [181]

Q. You don't know one way or the other, whether the minutes were written before or after the purported meeting, do you?

A. No.

Q. You don't know whether or not the minutes were written before the purported meeting or thereafter at the purported meeting things took place as

(Testimony of Michael Maffei.)

recorded in the minutes, do you? A. I do not.

Q. Now, can you tell me whether or not in the purported meeting of this holding company, or the Empire Corporation, or the Merchants Ice & Cold Storage Company, or the Laundry Company, and the like, whether on any other occasion minutes of a purported meeting were written before the purported meeting took place?

A. Always after—the minutes were always written after the meeting.

Q. You are quite sure of that?

A. I am pretty sure.

Q. Did you ever, personally, write the minutes?

A. Not a one.

Q. Did you ever see them written? A. No.

Q. You were never, personally, the author of any of these, were you? A. No.

Q. You have, personally, never seen the minutes written?

A. Well, I have seen them dictated to the secretary and she would write them up.

Q. Were you dictating them?

A. Mr. Arnold dictated the minutes.

Q. Always? A. Yes.

Q. Well, did Mr. Arnold dictate, so far as you know, these minutes of August 20, 1942?

A. I couldn't tell you.

Q. Going back to the resignation of Mr. Scampini, the resignation in April in the year 1936, resigning as a director of the Pacific Empire Corpo-

(Testimony of Michael Maffei.)

ration, you recall that letter of resig- [182] nation, don't you? A. I do.

Q. And without stopping to look at it, because we have already read it, you recall that in there he stated one of the reasons he was resigning was that no meeting had ever taken place since the organization of the company?

A. That was of one corporation.

Q. I did not ask you to take offense at the corporation, I say you remember, don't you, that he gave that as a reason in 1936 for resigning from that corporation?

A. Well, that corporation, yes.

Q. Well, you remember, don't you?

A. Yes.

Q. Now, that was the Pacific Empire Corporation, wasn't it? A. Correct.

Q. And that letter of resignation by Mr. Scampini was—what was it, three or four years after the organization of the company, or how long?

A. Oh, I don't know, I guess a couple of years, maybe, or three.

Q. When was the Pacific Empire Corporation organized?

A. It was organized I think, in—I don't know whether it was 1932 or 1933.

Q. You recall, don't you, that this resignation letter of Mr. Scampini was around three or four years after the organization of that company?

A. In that neighborhood.

Q. In that neighborhood? A. Yes.

(Testimony of Michael Maffei.)

Q. Was or was not the statement that Mr. Scampini made in his letter of resignation as director true?

A. Well, as to certain portions it was true.

Mr. Naus: I ask that that go out as not responsive. I asked him whether the statement is true as to a particular corporation.

The Court: He qualified it. I will allow the answer to [183] stand.

Mr. Naus: Q. From the time Pacific Empire Corporation was organized in 1933 until the time of Mr. Scampini's resignation letter of 1936 had or had not any meetings of the stockholders or directors of Pacific Empire Corporation actually occurred in fact?

Mr. Scampini: May it please the Court, I submit the record speaks for itself. The minute book of the Pacific Empire Corporation is marked for identification, if counsel wants to read from it.

The Court: He may answer the question.

Mr. Naus: May we have the question read?

(Question read by the reporter.)

A. There was no stockholders meeting, no.

Q. Well, my question was more than that, not merely stockholders, stockholders or directors, had there been any directors meetings in fact after the organization meeting in 1933 and prior to Mr. Scampini's resignation letter in 1936?

A. There were some meetings, but I don't know how many.

(Testimony of Michael Maffei.)

Q. Well, there were some meetings of the directors——

A. I think the book will show.

Q. I am not asking what the book shows. We have here a statement from your attorney in resigning, and putting it partly on the ground that you had not held any meetings. I am trying to find out whether that was or was not true.

A. Well, while Mr. Scampini was a director I don't think we had any meeting.

Q. He had been a director from the time of organization in 1933 until the date of his resignation letter sometime in 1936?

A. Doesn't the minute book show he was a director? [184]

Q. I am asking you.

A. I don't remember if he was a director from the start of the organization, or not.

Q. Well, will you please look at the book?

The Court: Ask him if he knows what the fact is.

Mr. Naus: Q. Do you know what the fact is? Where is the book? I have never personally examined the book so far because it was produced by Mr. Scampini.

The Court: Do you know whether Mr. Scampini was a director?

Mr. Scampini: Yes, Mr. Scampini was a director from the inception. I will stipulate to that.

Mr. Naus: Mr. Scampini is prepared to state from the time of the organization of the company in 1933 until his letter of resignation he had been

(Testimony of Michael Maffei.)

a director, so you will accept that statement, won't you? A. Yes.

Q. I understand you to say that from the organization until he resigned there had never been any directors meeting of the Pacific Empire Corporation: Is that correct? A. That is correct.

Q. Now, I show you page 72 of the Pacific Empire Corporation: Does that contain or carry your signature as chairman of the meeting of the board of directors? A. Right.

Q. And on page 71, the page before, the waiver of notice of meeting, is that also your signature?

A. Correct.

Q. Did you on page 73 sign the waiver of notice of meeting, and did you on page 72 sign minutes of the purported meeting of the board of directors of Pacific Empire Corporation as of January 8, 1935, a meeting that never occurred?

Mr. Scampini: I object to the concluding statement of Mr. Naus, "a meeting that never occurred."

The Court: You are assuming a fact not in evidence.

Mr. Naus: He has already stated that from the organization [185] in 1933 until Scampini's resignation in 1936 there had never been a meeting, and this is a date in between.

The Court: There was no meeting between those dates?

Mr. Naus: That is his testimony.

Mr. Scampini: The minutes are the best evidence.

(Testimony of Michael Maffei.)

The Court: Proceed.

Mr. Naus: Q. Please keep that open at 71 and 72, I am going to ask a question or two about it and we will pass to something else. Now, I point out to you, call your attention to page 72, that that purports to be the minutes of a meeting of the directors on January 8, 1935. I point out to you that that was after the organization meeting and more than a year before Mr. Scampini's resignation, and having that in mind, is it not a fact that that meeting never in fact took place?

A. I couldn't answer that, if there was a meeting or not.

Q. Well, then, I turn to another page here, page 74, is your signature on there?

A. It is all on there.

Q. Is your signature on there? A. Yes.

Q. Waiver of the meeting of the board of directors of Pacific Empire Corporation to be held May 15, 1935, do you see that? A. Yes.

Q. The next page, 75, is your signature on there as chairman of a purported meeting?

A. Right.

Q. A meeting of the board of directors purporting to take place May 15, 1935? A. Yes.

Q. Did that meeting in fact take place?

A. We had so many meetings that I couldn't remember what I signed.

Q. I can't say either, and that is why I am asking some questions about that and I would like to

(Testimony of Michael Maffei.)

have an answer. Did that meeting take place on May 15? A. I don't remember. [186]

Q. At page 75 of the minute book of the Pacific Empire Corporation? A. I don't know.

Q. You don't know? A. Yes.

The Court: Q. You have already testified that there was no meeting occurred up to the time Mr. Scampini resigned, or did I misunderstand the testimony?

A. We had so many meetings there that I don't remember if we had any meeting at all.

Q. You have already testified that there was no meeting.

Mr. Naus: Up until the Scampini resignation.

The Court: That is what you testified, that there was no meeting.

Mr. Naus: Q. Your final answer is, as you look at the particular minutes on page 75, the meeting of May 15, 1935, you are not prepared to say at this moment, notwithstanding your signature there as chairman, whether the meeting ever took place?

A. That is right. I don't know.

Q. All right, on page 76, is your signature on there? A. Right.

Q. That is on a purported waiver of a directors meeting as of May 17, 1935, is that correct?

A. Yes.

Q. Turn to page 77, running over to page 78, that purports to be minutes of a purported meeting of the board of directors of May 17, 1935; that is correct, isn't it? A. Right.

(Testimony of Michael Maffei.)

Q. Is that your signature on page 78?

A. Yes.

Q. As approving them? A. Yes.

Q. Did that meeting in fact take place?

A. I don't recollect, I signed it.

Q. You have already told me that. Pages 81 and 82 and so on are purported exhibits.

A. Yes.

Q. We turn next to page 83, that is your signature on there, is it? A. Right. [187]

Q. Of a purported waiver of a purported meeting for Saturday, May 18, 1935. A. Correct.

Q. Followed by pages 84, 85, 86, 87, a running account of a purported meeting of the board of directors of May 18, 1935. Now, your signature is on that, is it? A. Right.

Q. Why is it? A. I don't know.

Q. Do you know the signature there?

A. Yes.

Q. Whose is it? A. Mr. Heer's.

Q. He was just the bookkeeper there?

A. Secretary.

Q. He was bookkeeper?

A. Bookkeeper and secretary.

Q. Bookkeeper of all of the corporations?

A. Yes.

Q. Did that purported meeting of May 18, 1935, take place, in fact?

A. I couldn't answer that one.

Q. Now, the next are exhibits. Now, for ex-

(Testimony of Michael Maffei.)

ample, beginning at page 88 and running to 89, 90 and 91, there is a document headed "Agreement," that is referred to in these purported minutes of May 18, 1935. You can see that, can't you?

A. Yes.

Q. You are not prepared to say, are you, that this purported agreement, pages 88, 89, 90 and 91, purported to be incorporated in purported minutes of the meeting, ever was approved by the Board of Directors of Pacific Empire Corporation held in fact: is that correct?

A. Yes.

Q. And the same is true as to this mass of documents following immediately after that and running to and including page 98, and also the other documents.

A. Yes.

Q. That relate to the same purported meeting, don't they?

A. Yes.

Q. You cannot say whether they were approved at a meeting of the board of directors held, in fact, can you?

A. Right.

Q. Now, I turn next to an unnumbered page, but apparently follow- [188] ing in chronological sequence, and purporting to be minutes of a quarterly meeting of the board of directors on the 27th of March, 1936, consisting of three pages, the third page having signatures. Is that your signature on there as chairman?

A. That is right.

Q. Did that purported meeting of March 27, 1936, ever take place, in fact?

A. You mean of the directors?

(Testimony of Michael Maffei.)

Q. I mean just what I asked. Turn your attention to specific pages in the minute book of the Pacific Empire Corporation, and one purported meeting on a particular date, and I will ask you whether that meeting took place, in fact. Did it or not?

A. I have no recollection.

Q. You cannot say one way or the other, can you?

A. No, I won't say yes or I won't say no.

Q. In any event, the mere fact that your signature is on there does not establish that it did take place, does it, do you get my question?

A. Well, the answer is the same, I don't know.

Q. Well, my question is this, I don't know what "yes" or "no" means in your mind; I will reframe the question so there can be no misunderstanding about it. The mere *find* that you find your signature on a purported meeting of the board of directors does not establish to your mind or memory that a meeting actually occurred, does it? A. No.

Q. As a matter of fact, when you see your signature, the signature "Maffei" on the minutes of a corporate meeting or purported meeting, for all you know that may or may not have ever taken place in fact, isn't that right? A. Correct.

Q. Now turn next to the unnumbered page or two pages, rather, purporting to be minutes of a purported regular quarterly meeting of the board of directors of Pacific Empire Corporation of June [189] 26, 1936. A. Yes.

Q. Your signature is not on there, is it?

(Testimony of Michael Maffei.)

A. No.

Q. There is Arnold's and Heer's signatures on there?
A. That is right.

Q. Did that meeting take place, in fact?

A. I don't know.

Q. What office did you hold in this corporation?

A. President.

Q. And chairman of the board of directors, as well?
A. Yes.

Q. Now, these purported minutes of the purported meeting of June 26, 1936, refer in their body to Exhibit "A" which immediately follows the two pages of minutes, and is headed "Assignment by way of collateral," and consists of two pages. Was that purported assignment ever approved or adopted by the board of directors of the Pacific Empire Corporation at a meeting held in fact?

A. Don't the minutes show?

Q. Please don't ask me any question about the minutes, you were present and I was not, and I am trying to find out from you. Can you answer that question?

A. I can't answer that question.

The Court: I think there is a lot of time being wasted. Why can't you answer the question? You have already testified there was no meeting held between the period of time you have gone over now.

A. We might have had a meeting or we might not.

(Testimony of Michael Maffei.)

Q. You have already testified there were no meetings occurred.

Mr. Naus: I am trying to call your attention to specific meetings.

The Court: It is mockery, outside of the court, and I do not approve of it, and I do not propose to waste any time on it.

Mr. Naus: Then I will turn to the last meeting, because I understand this is the one at which Mr. Scampini's resignation was presented. Now, at that purported meeting, quarterly meeting of the board of directors of September 25, 1936, at which [190] were present Maffei, Heer, Arnold and Ber-cut, and absent Scampini, and purporting in the minutes to act upon the resignation of Mr. Scampini, was even that meeting of September 25, 1936, held, in fact? Did you actually accept Mr. Scampini's resignation at a meeting that was actually held? A. No.

Q. In other words, the minutes purporting to accept his resignation are minutes of a meeting that never occurred, is that right?

A. That is right.

Q. Now, there is a copy of Mr. Scampini's letter attached to these purported minutes and it recites there to you folks, "I have been constrained to make this decision because of the fundamental differences of opinion prevailing between me and the management concerning the policies and conduct of the company's business." I take it for granted,

(Testimony of Michael Maffei.)

necessarily, that Mr. Scampini, a reputable lawyer, would not have written a letter to a client making such a statement unless there was some disagreement between him and the client, and if there was a serious disagreement I would assume that the client would remember it. What were the differences which led to the resignation?

A. It was on account of the meetings of the corporation.

Q. That is true generally, but you must have had some talk between you, attorneys do not quit clients quick like that after a few years of service. What did you say and what did he say?

Q. We did not have any talk about it, at all.

Q. Did he say, "Well, now, unless you start holding meetings I will resign, but if you start them and follow my advice I won't resign." Did he say anything like that? A. No.

Q. Did it come out of a clear sky?

A. Yes.

Q. You mean you got that letter of resignation out of a clear sky, without any quarrel about it?

A. He complained about the [191] meetings and that is all the reason.

Q. What, specifically, did he complain about meetings?

The Court: The testimony is that he resigned because——

Mr. Naus: They had no meetings.

The Court: They had no meetings.

(Testimony of Michael Maffei.)

Mr. Naus: Q. Well, from the time he resigned, onward from there, in the future, did you actually hold meetings? A. After he resigned?

Q. Yes. A. We had no meeting.

Q. Well, do you mean to say that this minute book of the Pacific Empire Corporation, this Volume 1, from beginning to end, throughout, recorded meetings that never occurred?

A. We would hold meetings at the office.

Q. Who?

A. Just the four of us, of the corporation.

Q. There were five on the board?

A. Five on the board.

Q. I want to get this clear in my mind: You mean that up to the time that Mr. Scampini resigned you never held meetings, but after he resigned you always held a meeting that was recorded there?

A. As I said before, I don't know how many meetings we held, I don't remember.

The Court: Q. Have you any distinct recollection of any meeting being held? Let us find out about that.

Mr. Naus: With your Honor's indulgence, I would like to do this. I now invite you to look through that minute book for all minutes of purported meetings of directors from the time of Mr. Scampini's resignation onward, and point to a single meeting that you say actually took place.

A. I can't tell you which one.

(Testimony of Michael Maffei.)

Q. I didn't ask you whether you could tell me which one. I asked you if you could point to any one that took place. I am not assuming that any took place, that is the reason my question is [192] the way I put it.

A. I could not say which one.

Q. You are using the word "which". My question is a little different.

A. I understand.

Q. Then answer it, please, kindly, the way I put it, is there any single meeting recorded in the book that in fact took place?

A. I could not tell which.

Q. Or whether any?

A. Or whether any.

Q. Now, down there at 26 O'Farrell street, you had your offices, as I understand it.

A. Correct.

Q. And all of these corporations occupied these offices for the same purpose?

A. Correct.

Q. There was Pacific Empire Holdings?

A. Right.

Q. And formerly the Calitalo was there?

Q. Yes.

Q. And the Pacific Empire Corporation?

A. Correct.

Q. And the Merchants Ice & Cold Storage Company?

A. Yes.

Q. And the Laundry Company, what was its name?

A. Laundry Service.

Q. There were some others from time to time?

A. Yes.

(Testimony of Michael Maffei.)

Q. All being run by the same two executives, Arnold and Maffei? A. Yes.

Q. With the same bookkeeper, Heer?

A. Yes.

Q. Now, in handling the affairs of these various corporations through that staff, did you handle the affairs of any one of these corporations in any different routine manner than you handled the affairs of any other?

A. Mr. Arnold handled pretty nearly all of the financial affairs of the corporations, of all of the corporations.

Q. My question is a little different. I am speaking now as to the manner of handling, not how you divided up the work, but the manner of handling. When it came to the writing up of the minutes, and keeping books, and the like, didn't you handle the [193] affairs of the corporation in the same manner?

A. No.

Q. You draw a distinction or difference between the corporations, do you?

A. Well, one corporation, the Merchants Ice & Cold Storage Company, we had meetings in that every month.

Q. Well, now, that is one thing. You actually held those meetings, did you? A. Yes.

Q. Where?

A. We held them on O'Farrell street, and at the Merchants Ice & Cold Storage Company both.

Q. Can you tell me any other difference in manner of handling affairs of those multitudinous cor-

(Testimony of Michael Maffei.)

porations—let us take the Pacific Empire Holdings.

A. We held our meetings there once or twice a year, or three times a year.

Q. What meetings?

A. Stockholders and directors meetings.

Q. They actually took place, in fact?

A. Yes.

Q. What was there about Pacific Empire Holdings Corporation that distinguished it from Pacific Empire Corporation with respect to whether meetings were actually held or not? Why did you distinguish between one of those corporations and the other one?

A. I don't know, there was some lack there some place.

Q. You just suppose there was some lack—
l-a-c-k? A. Some lack there.

Q. What lack was there?

A. Well, we didn't hold meetings as with the other corporation.

Q. I know that is what you told us, but I am trying to find out not only for the benefit of myself, but for the benefit of the court, why you handled the affairs of one corporation any differently than you handled the affairs of another corporation. You have told us that you handled them differently, but you had not come to the point of telling us why.

A. There was no reason [194] for it.

Q. There was no reason. As you sit there right now you know, don't you——

(Testimony of Michael Maffei.)

A. (Interrupting) Yes.

Q. That there is absolutely no reason under the sun, whatever, why you should have handled the affairs of the Pacific Holdings any different from your manner of handling the affairs of the Pacific Empire Corporation? A. That is right.

Q. Now, tell me, Mr. Maffei, why did you and Mr. Arnold sell this block of Merchants Ice & Cold Storage Company stock to Mr. Bercut?

A. On account of financial conditions.

Q. Well, can you keep in mind that this whole lawsuit is about that sale? A. I understand.

Q. And that you are one of the defendants, here, and you have an attorney sitting over at the table where I am? A. That is all right.

Q. All right, can you tell his Honor any more about why you sold that stock to Bercut than you have just said?

A. That is all we sold it for, on account of financial conditions, and finding ourselves pressed for finances; there was nothing else to do.

Q. You had been in there at 26 O'Farrell street, you and Mr. Arnold—— A. That is right.

Q. How long, for how many years?

A. About twelve years.

Q. You and Arnold, both?

A. Arnold came in after.

Q. I am asking how long you and Arnold were in there together.

A. Oh, I think about ten or eleven years.

(Testimony of Michael Maffei.)

Q. About ten or eleven years before this sale to Bercut? A. Right.

Q. Now, there was at one time what might be called a Vincent-Stratton management of these corporations? A. Right.

Q. That began when and ended when?

A. That began in 1929; they [195] were there before I was.

Q. They were there before you were?

A. I went in about the first part of 1929.

Q. Who put you in there?

A. Mr. Stratton and Mr. Vincent.

Q. Mr. Vincent was a stock promoter and they formed a partnership between Vincent and Stratton? A. Yes.

Q. This stock firm of Vincent-Stratton was the one who put you into 26 O'Farrell street in the first instance? A. Yes.

Q. Then when you bought the big block of Merchants Ice & Cold Storage Company stock, the Pacific Holdings, you bought it from the Vincent-Stratton crowd, did you not? A. Right.

Q. Which by that time had been joined by a lawyer, by Joseph McInerney? A. Yes.

Q. It was a three-way deal between McInerney, Stratton and Vincent?

A. It was McInerney, Stratton and Vincent and Sherman, four.

Q. Did Sherman have anything to do with the deal, or wasn't the cut three ways between Vincent, Stratton and McInerney?

(Testimony of Michael Maffei.)

A. There was an option, the three of them got together and sold the block of stock to the holding company for a certain amount.

Q. Three of them? A. Four.

Q. Three or four?

A. Vincent, Sherman, Stratton and McInerney.

Q. And at that time the management changed away from Vincent and Stratton, didn't it?

A. Correct.

Q. Who did it change to?

A. It came to myself and Mr. Arnold.

Q. In other words, from the time Vincent, Stratton and McInerney went out of the management you and Mr. Arnold have been in the saddle there ever since until the receiver came in, running these corporations to suit yourselves, haven't you?

A. Well, we tried to run them to the best of our ability. [196]

Q. I know to the best of your ability, but you and Arnold decided just what was to be done and did it, isn't that correct? A. Yes.

Q. That was during all of the time after Vincent and Stratton went out and left you in there?

A. Yes.

Q. That ran over a period, let us say, of ten years before the sale to Bercut?

A. About nine or ten years.

Q. And in that ten-years time is it not true that the aggregate of the annual deficits of Merchants Ice & Cold Storage Company, after giving effect to depreciation, exceeded a half million dollars?

(Testimony of Michael Maffei.)

A. In that period of time?

Q. That is the period I am taking.

A. After depreciation?

Q. After depreciation. Do you understand my question, or shall I have the reporter read it?

A. I understand the question. What is the exact amount?

Q. Would it help you if I gave you the exact amount?

A. I know after depreciation there was a loss.

Q. So do I, but I want his Honor to learn exactly what it was. You have been testifying on your direct examination to the valuation, and so forth and so on. Let us find out what the fact is.

A. Yes.

Q. So I will put the direct question to you, a man who was running things, or was responsible, with Mr. Arnold, in running things, and who had custody of the records, and presumably approved the balance sheet, I will ask you if it is not a fact that under the management of yourself and Arnold, in the period of ten years ending December 31, 1940, and preceding the sale to Peter Bercut, whether the aggregate of the annual deficit of the Merchants Ice & Cold Storage Company for that period was \$523,501.35?

A. I don't think we managed the thing ten years, [197] the Merchants Ice & Cold Storage Company.

Q. I will reframe the question. How long did you state that you had control?

A. Well, I couldn't give you the exact figures.

(Testimony of Michael Maffei.)

Q. What was the first year you had control?

A. I think the holding company did not get control until after the management commenced of the holding company.

The Court: We will adjourn now. There is a jury coming in here tomorrow and the case will go over to May 4th.

Mr. Scampini: Might I say that Mr. Wingate and Mr. Culbertson are here from Wilmington and they will have to go back, and I would like to know whether or not counsel is willing to stipulate that under the laws of Delaware, with respect to the rights vested in the receiver which I have pleaded in my complaint, and if not I would like to put Mr. Wingate on the stand.

Mr. Naus: I would rather put it this way, I would rather not stipulate to it, but I am willing to withdraw our denial in our answer of the allegation in the complaint.

Mr. Scampini: Mr. Culbertson says he is not willing to accept that. He says that the stipulation he wants is that under the laws of Delaware all rights are vested in the receiver.

The Court: There is no question but that the receiver is vested with title to all the property and assets. You can enter into a stipulation with counsel as to anything further.

Mr. Naus: I think so.

(Thereupon an adjournment was taken until Tuesday, May 4, 1943, at 10:00 o'clock a. m.)

(Testimony of Michael Maffei.)

Tuesday, May 4, 1943—10:00 A. M.

MICHAEL MAFFEI

recalled;

Cross Examination

(resumed)

Mr. Naus: Mr. Maffei, toward the end of the other day in court, you stated the reason you sold this Merchants Ice & Cold Storage stock to Mr. Bercut was on account of financial conditions, the company was pressed for finances, and there was nothing else for you to do. You recall that answer, do you not? A. That is right.

Q. Now, Mr. Maffei, as a matter of fact, in the handling of these various corporations,—the Pacific Empire Holdings, Inc., Pacific Empire Corporation, Merchants Ice & Cold Storage Company, and the Laundry Company, and so on,—you and Mr. Arnold took the cash that any of these corporations had on hand at any time and used it as you pleased for the use of any of the other corporations, didn't you?

A. That is right.

Q. In so far as yourself and Mr. Arnold were concerned, these corporations had four different pockets, and you took it out of one pocket of the four and put it into any one pocket that you wanted?

A. We used one corporation as the holding company.

Q. Now, as a matter of fact at the time you sold this to Mr. Bercut, with respect to the financial difficulties you were speaking about, all four corpora-

(Testimony of Michael Maffei.)

tions had substantially run out of cash, hadn't they, and credit for all practical purposes?

A. They had.

Q. As a matter of fact, the Merchants Ice & Cold Storage Company did not have enough cash on hand to meet its payroll? A. That is right. [201]

Q. You had not only run out of credit, but you had reached the extreme end of your credit, hadn't you? A. Correct.

Q. You tried to borrow more money and could not, isn't that the fact?

A. That is right.

Q. When I say "tried to borrow money," you were not able to borrow any on the credit of any of the corporations, is that right?

A. That is right.

Q. As a matter of fact, you not only did not have enough cash to meet the payroll of the Merchants Ice & Cold Storage Company, isn't that right? A. That is a fact.

Q. Down at the Merchants Ice & Cold Storage Company you were quite a consumer customer of the P. G. & E., were you not, for electricity and power?

A. Yes.

Q. It had to use several thousand dollars worth of that current monthly to operate its business, didn't it? A. Yes.

Q. Weren't you several months behind with the P. G. & E? A. We were.

Q. Didn't you owe them twenty-five or thirty thousand dollars at the time of this deal, \$25,000 or

(Testimony of Michael Maffei.)

\$30,000 or \$35,000, somewhere in that neighborhood, and you could not pay it?

A. Not that I know of.

Q. How much money?

A. I think about \$5,000 or \$6,000.

Q. Are you sure? A. I am not sure.

Q. You are not sure about it? A. No.

Q. At the time of the deal there was a bond issue which Merchants Ice & Cold Storage Company had outstanding? A. Yes.

Q. In the principal sum of \$659,000?

A. Right.

Q. That carried 6½ per cent interest, did it not?

A. Correct.

Q. And it took somewhere around \$40,000 or a little better each [202] year to keep the interest paid up? A. That is right.

Q. You paid that interest semiannually, every six months, isn't that true?

A. That is correct.

Q. Requiring something around \$21,000 or \$22,000 each six months to keep it paid, in that neighborhood? A. Yes.

Q. Now, what were the two dates each year that you had to put up the money with the trustee for the bond issue, to pay the interest; when did it fall due? When did you have to put it up with the trustee?

A. I think it was the middle of the year and first part of the year.

(Testimony of Michael Maffei.)

Q. Well, didn't it fall due in October and in April? A. October and April, yes.

Q. And it was required under the indenture to be put up with the trustee a month in advance so as to have it on hand? A. Yes.

Q. The indenture called for that? A. Yes.

Q. So, for practical purposes it fell due in September and March? A. Right.

Q. You had to put it up then? A. Yes.

Q. Now, in September, 1940, when the sum of twenty-odd thousand dollars fell due, you did not have any more unsecured bank credit, did you?

A. We could not get any more credit.

Q. As a matter of fact, as of that time you were selling ice to the City Ice Delivery Company at the rate of \$20,000 a year on daily delivery?

A. Yes—so many tons.

Q. So many tons a day. It ran along pretty uniformly, and there were selling proceeds of around \$20,000 a year? A. More or less.

Q. In that neighborhood? A. Yes.

Q. Now, didn't you in September of 1940—I am speaking now [203] of the Merchants Ice & Cold Storage Company—didn't you and Mr. Arnold have the Merchants Ice & Cold Storage Company assign that ice contract a year ahead in order to get immediately \$20,000 to pay the bond interest?

A. There was something like that at one time; I could not exactly remember the date.

Q. Wasn't it the last time that the bond interest had to be paid up before the deal was made with Mr. Bercut?

(Testimony of Michael Maffei.)

A. I don't remember whether it was or not.

Q. At the time of the sale to Mr. Bercut isn't it a fact that your ice contract for a year ahead was in soak?

A. I don't remember that; I couldn't tell you.

Q. You don't know one way or the other?

A. I don't remember whether it was at that time. I know it was at one time, but I couldn't tell you whether it was that time or before.

Q. Now, of course, in assigning that contract for a year ahead, you spent the money at the beginning of the year and then you had to buy power and pay the payroll and pay for freezing agents for a year to produce the ice?

A. I suppose that we had to do it when we needed it.

Q. I did not ask you that. I am saying, having borrowed the money you would take the \$20,000 that you borrowed and turn it over to the trustee under the bond issue?

A. I don't remember of borrowing \$20,000.

Q. Do you remember how much you did borrow?

A. No, I do not, because I do not handle that myself.

Q. Do you remember whether at the time of the deal with Mr. Bercut taxes owing to the City and County of San Francisco on real property were delinquent?

Mr. Scampini: May it please the Court, I have not made any objection to this line of examination

(Testimony of Michael Maffei.)

because it really [204] does not make much difference on our side, but after all, the best evidence is the books and records, and this cannot be answered by this witness.

Mr. Naus: I am trying to get at the facts. I would remind your Honor that when we were last on trial, three or four times during the direct examination of this witness——

Mr. Scampini: Just a moment, Mr. Naus; there is no direct examination of this witness. Let us have that clear in the record. I called this witness as an adverse witness under Section 43(b) of the Rules of Civil Procedure.

Mr. Naus: If your Honor please, he was not called by me as my witness.

Mr. Scampini: He is not ours.

Mr. Naus: So far as this deal is concerned, there were three or four times during what I call the direct examination of this witness where Mr. Scampini would occasionally ask this witness, "Well, now, don't you find on such a date that the Merchants Ice & Cold Storage showed the value was several hundred thousand dollars, and six hundred or seven hundred or eight hundred thousand dollars"—he was talking about values here and there.

Mr. Scampini: I submit that statement is purely argumentative by counsel and the transcript will indicate no such line of examination on my part.

Mr. Naus: You called attention to the balance sheet of the Pacific Empire Holdings in which the

(Testimony of Michael Maffei.)

stock of Merchants Ice & Cold Storage Company was carried as an asset at some \$500,000, and referred to another item of \$200,000, a total of \$700,000, and asked him whether in his opinion in good faith the Merchants Ice & Cold Storage Company stock was worth that [205] much.

The Court: I will allow the question. Read the question.

(Question read.)

A. There was some delinquent, but as I said before, I didn't handle the affairs of the Merchants Ice & Cold Storage Company; Mr. Arnold handled them, and the exact amount I couldn't tell you.

Mr. Naus: Q. You do know, don't you, generally, approximately, that the tax bill of the City and County of San Francisco with respect to the Merchants Ice & Cold Storage Company was around \$15,000?

A. Whatever it was.

Q. I am asking you. You know that, don't you?

A. Well, yes.

Q. Don't you know at the time of the deal with Mr. Bercut there was approximately \$25,000 taxes owing to the City and County of San Francisco delinquent and bearing delinquent interest?

A. I didn't know that.

Q. Do you know that during all of the time that you and Mr. Arnold were in charge of all these corporations there was not a single year that you and Mr. Arnold had the Merchants Ice & Cold Storage Company that there was ever any net income reported, but always a deficit reported?

(Testimony of Michael Maffei.)

Mr. Scampini: Why ask him? You have the records in your hand.

The Court: Maybe you can arrange it by stipulation.

Mr. Scampini: I will stipulate to nothing. He has the records in his hand. Let him offer the records and they will speak for themselves.

The Court: Very well.

Mr. Naus: Q. My question, Mr. Maffei, is: Don't you [206] know as a fact that annually, while you and Mr. Arnold were running this corporation, annually the Merchants Ice & Cold Storage Company put in a corporation income tax return to the Federal authorities, and during every year of your management it showed an operating deficit?

Mr. Scampini: I object to the question on the ground it is calling for the conclusion of the witness, and the records are the best evidence.

The Court: He may answer if he knows.

Mr. Naus: Q. Do you know?

A. After depreciation, yes.

Q. Naturally, you know that depreciation on physical plant is part of the operating expense of a corporation like Merchants Ice & Cold Storage Company? A. Yes.

Q. You know that, don't you? A. Yes.

Q. Do you recall what rate of interest you were paying on the bank debts of the Merchants Ice & Cold Storage Company? A. On the loan?

Q. Yes.

(Testimony of Michael Maffei.)

A. I don't know whether it was six or seven per cent.

Q. Wasn't it more than that? Are you sure?

A. I am not sure.

Q. Now, also at the time of this deal isn't it a fact that the Bank of America was making a claim against Merchants Ice & Cold Storage, a claim somewhere around \$35,000 or in that neighborhood?

A. Correct.

Q. Because of some phony butter receipts that had been put out?

Mr. Scampini: Let us have all the facts of that transaction, and not his conclusion.

The Court: Develop the facts.

Mr. Naus: Q. Mr. Maffei, the Merchants Ice & Cold [207] Storage Company operated at least as part of its business, or a large part of its business, a public warehouse and issued public warehouse receipts? A. Correct.

Q. Negotiable receipts? A. Correct.

Q. State whether or not at the time of the deal with Mr. Bercut there were outstanding receipts issued by Merchants Ice & Cold Storage Company for butter purported to be on storage with it but for which no butter had been deposited in storage?

A. Well, that—

Mr. Naus: May it please the Court, I ask that the witness be compelled to answer Yes or No.

The Court: He may answer.

A. I don't know whether the butter was ever in

(Testimony of Michael Maffei.)

there or never in there. I could not tell you one way or the other, whether that butter went in or did not go in. I don't know.

Mr. Naus: Q. In any event, when the receipts were tendered there was no butter there; isn't that correct?

A. I don't know how that thing happened.

Q. Do you know whether or not at the time of the deal with Mr. Bercut the Bank of America was making a claim against Merchants Ice & Cold Storage Company? A. Right.

Q. Wasn't the claim based on the assertion that it in the course of business had gotten butter receipts, warehouse receipts, in its hands and had loaned money against them and the receipts had not been honored?

A. Well, it might have been that the butter was delivered before getting the release of the Bank of America by some of the clerks on the inside.

Q. Do you know whether or not that claim had been made some substantial period of time before you made the deal with Mr. Bercut, a long enough period of time to investigate and find out [208] the facts?

A. No, it was shortly before; I think it was just a matter of a couple of months or so.

Q. Do you know whether or not the Merchants Ice & Cold Storage Company finally paid out nearly \$25,000 to settle that claim? A. I don't know.

Q. You don't know anything about that?

A. No.

(Testimony of Michael Maffei.)

Q. Now, those were receipts that were issued to a firm by the name of Bennett & Layton, weren't they? A. That is right.

Q. You recall, do you not, that the Merchants Ice & Cold Storage Company got a five-year moratorium on the payment of the principal bond issue?

A. That is correct.

Q. That was obtained, was it not, in 1937?

A. That is right.

Q. So that the next installment of the principal would fall due in 1942? A. That is right.

Q. Do you recall when in 1942 that would be?

A. I think the first part of 1942.

Q. It would be less than a year after the deal with Mr. Bercut, would it not?

A. Whatever that date is.

Q. At the time you sold him you did not know where you could lay your hands on the cash to pay the interest that would fall due in March, did you?

A. That is right.

Q. By the way, in obtaining that five-year moratorium, the expenses for court costs and the like, the trustee and others, amounted to some \$25,000, didn't it?

A. I couldn't say the exact amount; the books will show what the amount was.

Q. I am asking if you have a recollection what it cost you to get that extension of time.

A. I don't know.

Q. Do you recall whether or not, whatever the

(Testimony of Michael Maffei.)

amount was, but assuming for the moment it was \$25,000, that was money that you paid out of expenses to get the extension? There is no [209] doubt about that? A. Correct.

Q. But as a matter of fact, you took the major portion of that expense of \$25,000 and carried it on the asset side of your balance sheet under the name of "Deferred Charges"?

A. I don't know.

Q. You don't recall whether or not after that extension of five years, costing you around \$25,000, that you carried the principal item of the cost as an asset?

A. I don't remember. The statement will show that.

Q. You don't recall it? A. No.

Q. Now, you stated at one time on your direct examination——

Mr. Scampini: I object again to the use of the term "direct examination," may it please the Court, and I submit to your Honor that this is not cross examination.

Mr. Naus: May I proceed with the question, your Honor?

The Court: Read the question.

(Question read.)

The Court: I do not know exactly what the record shows.

Mr. Scampini: It was cross examination of an adverse party.

(Testimony of Michael Maffei.)

The Court: We are confused, I think, sometimes in reference to the scope of examination. Because you call him as an adverse witness does not indicate that counsel cannot go into everything that you went into.

Mr. Scampini: I think your Honor is correct, but when he uses the term "direct examination," he would infer that I called this witness as my witness and I am bound by his testimony.

The Court: Do you have in mind the language in the rule?

Mr. Scampini: The language in the rule 43(b).

Mr. Naus: I do not think the rule supports any such view as that. [210]

The Court: In the interest of time, dispose of the words "direct examination" and you will get the same results.

Mr. Naus: Q. In your examination by Mr. Scampini, who on behalf of the plaintiff called you as a witness, Mr. Maffei, you recall, do you not, that you said that the Merchants Ice & Cold Storage Company stock cost Pacific Empire Holdings around \$250,000? A. Correct.

Q. As I remember it, you made that answer during your examination as though you were stating it from memory, from no paper in your hand.

A. What is that?

Q. Were you stating that from memory at the time you answered the other day?

A. I said I could not give the exact figures, but I thought it was in that neighborhood.

(Testimony of Michael Maffei.)

Q. Now, as a matter of fact, the Merchants Ice & Cold Storage Company stock carried on the assets side of the Pacific Empire Holdings balance sheets was being carried there in the aggregate of around \$700,000, was it not? A. That is right.

Q. That \$700,000, all of that but your figure of \$250,000, was merely a book write-up, was it not?

A. That was according to the report of the Merchants Ice & Cold Storage Company.

Q. I say it was merely a book write-up from cost?

A. I couldn't tell you whether it was a book write-up.

Q. Isn't it a fact that as you bought the various units of this block of Merchants Ice & Cold Storage Company stock that they bought, for example, at \$100,000, you would immediately put that in the books at a write-up amount of \$250,000 or \$300,000?

A. The difference between the cost and the value.

Q. It was a write-up, was it not?

A. It would be.

Q. Now tell me from your memory, Mr. Maffei, as you did with respect to this \$250,000, who you bought it from. Wasn't it [211] largely from McInerney, Vincent, Stratton and Sherman?

A. Those were the biggest blocks.

Q. Now, as a matter of fact, you did not really pay them \$250,000 for it, did you, or do you know what you paid them?

A. Well, the way to find out is from the books.

Q. You did not refer to the books when you gave the figure of \$250,000. I am going to get

(Testimony of Michael Maffei.)

where you took that figure from. Where did you get that figure of \$250,000 in your mind; how did you make it up?

A. I know more or less how much the big blocks cost.

Q. What are you referring to as the big blocks?

A. The Vincent-Stratton block was around \$90,000, and the McInerney stock was around \$80,000—\$75,000 or \$80,000, something like that.

Q. All right, take the Vincent-Stratton block. You say that block cost about what?

A. About \$85,000, between \$80,000 and \$90,000.

Q. Between \$80,000 and \$90,000? A. Yes.

Q. Do you recall that you immediately recorded in the books of the Pacific Empire Holdings that as an asset in the amount of \$250,000, that one block?

A. Well, that was according to the statement of the Merchants Ice & Cold Storage Company, I suppose, not the cost.

Q. I don't know how you arrived at the figure; I am asking you about the fact. You recall that this block of stock that you say you bought from Vincent and Stratton for around \$80,000, that you recorded this in the books of the Pacific Empire Holdings as an asset of the value of \$250,000; do you recall that?

A. Well, I suppose that was put on the books as the value of the stock. [212]

Q. Do you recall that?

A. I don't recall that.

(Testimony of Michael Maffei.)

Q. Do you or not recall that that purchase from them was by way of settlement of a controversy with them?

A. It was a settlement of a note that they owed the company.

Q. A note or an open account?

A. An open account in the books.

Q. It was an open account in the principal sum of \$71,900 with interest around \$5,000, was it not?

A. Yes, it was close to that.

Q. In other words, they turned over the Merchants Ice & Cold Storage Company stock that they, Vincent and Stratton, had in order to wipe out a book debt that they owed the corporation; is that true? A. Yes.

Q. That was money that they had withdrawn from the corporation from time to time in the past while they were in control?

A. How they got it I don't know, but they owed the company that much money.

Q. It was money they owed the company for quite some time, was it not? A. Right.

Q. That was when? When did that occur, what year?

A. I don't know; I think it was around 1932 or 1933, something like that.

Q. Now, as to the McInerney stock, what did you say that cost?

A. That cost us around \$80,000.

Q. Do you recall immediately writing it up in

(Testimony of Michael Maffei.)

the books of the Pacific Empire Holdings for roughly at least what it cost you?

A. I think they put it in the same as the others.

Q. I say do you recall that?

A. I don't recall the date.

Q. But you recall the transaction?

A. I recall it.

Q. As a matter of fact, in acquiring that stock from McInerney [213] you did not at the time of the acquisition pay out any cash for it, did you?

A. At the time we paid him, I think, \$10,000.

Q. As a matter of fact, Mr. McInerney in turn had acquired that stock and given his note to the City National Bank, hadn't he?

A. No, I don't recall that exactly.

Q. Can you recall any cash that Pacific Empire Holdings actually put out to acquire these blocks of stock, the major blocks, from McInerney, Vincent and Stratton and Sherman—can you recall actually any cash they put out at the time except \$10,000?

A. McInerney was paid.

Q. I am asking you now how much cash you put out at the time of acquiring these two blocks of stock.

A. I can't remember how much cash; I would have to look at the book.

Q. Have you any recollection of putting out any more than \$10,000 in cash, if you put out that much?

A. No. We paid McInerney ten or fifteen thousand dollars cash and the balance was paid later, afterward.

(Testimony of Michael Maffei.)

Q. In addition to the \$35,000 that Mr. Bercut paid, he in addition to that had to pay out \$3,950, did he not, to take up some of the stock that you agreed to turn over to him?

A. I don't know.

Q. Have you no knowledge of that?

A. No.

Q. Mr. Maffei, during the management of the Merchants Ice & Cold Storage Company by you and Mr. Arnold, can you recall any time during the entire period when the bonds of the Merchants Ice & Cold Storage Company were bought and sold in the market at par or as much as par?

A. At no time.

Q. They were always well below par, weren't they? A. Yes. [214]

Q. At some stages of your management they were not worth more than \$30 or \$35 on the hundred in the market, were they?

A. Well, before our management they were down to 21, and after our management they went up to 85.

Q. What were the bonds being bought and sold for at the time of the deal with Mr. Bercut?

A. Around 80 or 85.

Q. By the way, at the time of the Bercut deal you personally owned some of the common shares of the Merchants Ice & Cold Storage Company, didn't you? A. Yes.

Q. How many shares? A. 400.

(Testimony of Michael Maffei.)

Q. 400 shares? A. Yes.

Q. Did you sometime after the Bercut deal sell those shares? A. About a week after.

Q. You sold them to Mr. Bercut? A. I did.

Q. At what price?

A. 50 cents a share.

Q. Now, the deal, as I understand you, with Mr. Bercut took place on January 8, 1941?

A. What date did you say?

Q. January 8, 1941.

A. I don't remember the date, because, as I said before, the whole deal was made by Mr. Arnold, and I only met Mr. Bercut one time on it.

Q. You knew at the time it was going on?

A. I knew. Mr. Arnold, he talked to me about it.

Q. He kept you informed from time to time of the negotiations he was having, so you knew the deal was going on?

A. I knew the deal was going on.

Q. That was early in January, 1941?

A. It was about that date.

Q. You turned the property over, the management of the corporation over to Mr. Bercut about a month after, didn't you? It took about a month to make the turn-over, didn't it?

A. I don't recall the date at all. [215]

Q. When did the idea first enter your mind of seeking a rescission of that deal with Mr. Bercut?

A. I don't know. I think Mr. Arnold and Mr. Bercut, about three months before the deal, they were talking about it.

(Testimony of Michael Maffei.)

Q. You misunderstood me. Since the deal you know there was an attempt to have the deal set aside or rescinded; you know that?

A. Yes.

Q. When did the idea of rescinding this deal first enter your mind? A. Which deal?

Q. This Bercut deal.

A. Well, I never had that in my mind at any time.

Q. Did you at some time after the deal with Mr. Bercut ever talk it over with Mr. Scampini?

A. I never talked about the deal with anybody, because I got out of it and I was through.

Q. You got out of what company?

A. The Holding Company.

Q. When did you get out of it?

A. I was out of it—well, I was out of the management from the 1st of December, 1941, but I was in there until the receivership came in, and then I resigned.

Q. You say you were out of the management in December, 1941?

A. I was out of the management. I was doing something else.

Q. Were you putting in any time with the corporation after December of 1941?

A. Very little time.

Q. Have you at any time since the deal, sometime, let us say, shortly before the receivership, ever talked the matter over with Mr. Scampini?

(Testimony of Michael Maffei.)

A. I never have talked it over with him.

Q. Prior to taking the stand as a witness you had never had any preceding talk with Mr. Scampini? A. Never did.

Q. Have you read Mr. Arnold's deposition, by any chance? A. I have not. [216]

Q. Would you tell me whether at any time before the receivership there were one or two or three occasions when you and Mr. Arnold and Mr. Scampini had lunch together? A. We did.

Q. And talked over the affairs of any of the corporations, including the deal with Mr. Bercut?

A. No, we just talked generalities, that is all.

Q. Who succeeded you in the management of the Pacific Empire Holdings?

A. Well, I was not an officer.

Q. You spoke a while ago about going out of the management in 1941, which was the better part of a year, more or less, before the receivership; is that correct?

A. I still was in the company, but I did not have a managing part.

Q. Who was actively managing the corporation?

A. Mr. Arnold.

Q. Up to the time of the receivership?

A. Mr. Arnold.

Q. Merchants Ice & Cold Storage Company never paid Pacific Empire Holdings any dividends during all of that time?

A. That is right.

(Testimony of Michael Maffei.)

Q. The Pacific Empire Holdings owned Merchants Ice & Cold Storage stock, did it?

A. That is right.

Q. Did the Pacific Empire Holdings have any income whatever during the time that you and Mr. Arnold were in the management?

A. Well, the only income was from the laundry in Bakersfield.

Q. Was that in the way of dividends or borrowing money? A. We borrowed it.

Q. I mean aside from borrowing some money, and aside from sales of assets did the Pacific Empire Holdings ever have any income during the time that you and Mr. Arnold were in the management? A. We did not have any income.

Q. No income at all?

A. Outside of the laundry, that is all. [217]

Q. Did the Pacific Empire Holdings own the laundry?

A. They did up to a certain period of time.

Q. What income did you get from the laundry aside from borrowing money from them?

A. I could not say exactly the amount; I would have to look at the books to see.

Mr. Naus: That is all.

Mr. Scampini: No further questions.

The Court: Step down.

Mr. Scampini: I will now ask Mr. Peter Bercut to take the stand. Let the record show we are calling him under Section 43(b) of the Rules of Civil Procedure as an adverse witness.

(Testimony of Peter Bercut.)

Mr. Naus: If your Honor please, counsel has announced he is calling Mr. Bercut as an adverse witness, which he has a perfect right to do, but I do not by my silence acquiesce in the assertion of counsel as to his right to call or how he calls him. He is calling him as a witness, but I do not acquiesce in his view.

PETER BER CUT

one of the defendants, called as a witness for the plaintiff under Section 43(b); sworn.

Direct Examination

Mr. Scampini: Q. Mr. Bercut, your full name, as I understand it, is Peter Bercut? A. Yes.

Q. Is that right? A. Yes.

Q. And your present occupation is what, Mr. Bercut?

A. Well, I am in business, in several businesses.

Q. I know that. Will you please tell us what your activities are?

A. Most of my activities are at the Merchants Ice & Cold Storage Company. [218]

Q. What position do you hold there?

A. President.

Q. When did you first become president?

A. In about February, sometime in February, 1941.

Q. What other business activities do you engage in besides that?

(Testimony of Peter Bercut.)

A. Well, I am president of the Bercut-Richards Canning Company in Sacramento.

Q. Let us see if we can accelerate these business activities of yours by referring you to a letter which has been sent to the stockholders of the Merchants Ice & Cold Storage Company under date of February 19, 1941, which is Plaintiff's Exhibit 19 for identification in the file, and ask you whether or not the signature which appears therein is your signature. A. Yes.

Q. Did you send this letter to the stockholders of the Merchants Ice & Cold Storage Company?

A. Yes.

Q. And as I see, in this letter you advised the stockholders as follows:

"To the Stockholders of the Merchants Ice & Cold Storage Company:

On February 1st of this year your Board of Directors elected a new President and Vice President to direct the affairs of your company in the future. This new leadership is composed of two brothers, namely, Peter and Henri Bercut, whose record for successful management is well known, not only in the State of California, but throughout the entire country. In addition to being the chief executive of your company the new leader is actively the President of the following corporations:

The English Estate Co.: Owning and operating land, orchards and cannery site adjacent to the City of Sacramento. [219]

(Testimony of Peter Bercut.)

The Bercut-Richards Packing Co.: One of the largest packers of fruits and vegetables in the state."

A. That is correct.

Q. "The Markets Investment Co: Owners and lessors of land and market properties."

A. That is right.

Q. "The San Francisco City Calf Skin Co.: Specializing in the selection and cure of calfskins and hides."

A. That is right.

Q. "Bercut Bros. Co.: Operating the Grant Market, in the City of San Francisco, whose volume of business at this location, according to some authorities is not exceeded at any other individual establishment elsewhere in the United States.

The two brothers also own and operate extensive apartment house properties in this city and serve as directors in various associations and institutions.

Their financial stability, their close contacts with the growers, producers, processors and packers of food products are ideally suited to strengthen and utilize the capacities of your properties."

Now, you state here that you also are directors in various associations and institutions. Will you please name the various associations and institu-

(Testimony of Peter Bercut.)

tions of which you were a director and not named in this letter?

A. The Apartment House Association, the City National Bank.

Q. The City National Bank? A. Yes.

Q. How about the Pacific National Bank of San Francisco? A. That is what I answered.

Q. How about the Pacific Empire Corporation?

A. I resigned from them. [220]

Q. When did you resign from the Pacific Empire Corporation?

A. I think it was about April.

Q. What year? A. 1940.

Q. 1940? A. Yes.

Q. How did you resign from Pacific Empire Corporation in April 1940?

A. Verbally. I told Mr. Arnold that I did not care to take any more interest in the company.

Q. Verbally? A. Yes.

Q. That is the Pacific Empire Corporation?

A. I never knew the difference between the two corporations, because they were so mixed. I meant both.

Q. You meant both of them?

A. Yes, sir.

Q. Now, to whom else did you say that you did not want to have any more to do with these companies on or about April, 1940?

A. My accountant told me to resign.

Q. Your accountant told you to resign; is that right? A. Yes.

(Testimony of Peter Bercut.)

Q. I did not ask you that. I asked you to whom else besides Mr. Arnold in these companies, that is, the Pacific Empire Holdings and the Pacific Empire Corporation, you made known your intention not to continue as an officer or director.

A. I told Arnold.

Q. You just told Arnold and nobody else?

A. That is all.

Q. You did not tell anybody else, did you?

A. No.

Q. You never sent in a resignation to either one of the companies later on, did you?

A. Later on I asked for my resignation in writing.

Q. You asked for your resignation first?

A. Yes, and I asked later to give it to me in writing.

Q. Let us get to the bottom of this thing. Did you ever file a written resignation as an officer or director of the Pacific [221] Empire Corporation?

A. Yes.

Q. When did you?

A. When we started to deal on this, I told Mr. Arnold that I would like to have my resignation in writing.

Q. You mean that you told Mr. Arnold you would like to submit your resignation in writing?

A. No; I wanted to resign, but I wanted everything in writing.

Q. You wanted to file it in writing?

(Testimony of Peter Bercut.)

A. I wanted to go on record.

Q. When did you tell that to Mr. Arnold?

A. Just when we were dealing for the purchase of the Merchants Ice & Cold Storage Company.

Q. Isn't it a fact that two or three weeks after the deal was completed you appeared in the office of the Holding Company, the Pacific Empire Holdings Company at 26 O'Farrell Street and dictated to Miss Keener, the stenographer, the resignation?

A. No.

Q. You never did? A. No.

Q. I will show you here Plaintiff's Exhibit No. 26 for identification, and I will ask you to read it and state to the Court whether or not that is your signature at the bottom of the letter.

A. That is my signature. I asked Mr. Arnold that I wanted to have it in writing, and he went into the office and he dictated that resignation himself. I never dictated anything to any of Arnold's stenographers.

Q. Where were you when you said that to Mr. Arnold?

A. I was in the office where the deal was made, Mr. McInerney's library there, that back room.

Q. You mean at 26 O'Farrell Street?

A. 26 O'Farrell Street.

Q. That was the office of the company, wasn't it?

A. No, he told me it was the office of Mr. McInerney. [222]

Q. Is that where they used to hold meetings of the Holding Company? A. Yes.

(Testimony of Peter Bercut.)

Q. Was the occasion upon which you signed this letter after the completion of this deal of January 8, 1941? A. It was before.

Q. It was before? A. Yes.

Q. Are you certain of that? A. Yes.

Q. And about when?

A. About a week before.

Q. I refer you to the answer to my interrogatories which are on file herein, wherein you stated you signed this letter on January 8, 1941. Is that correct? A. Did I say January 8?

The Court: What is the date of that letter?

Mr. Scampini: This is March 30, 1940, your Honor.

Q. I will show you here a reply to a request for the admission of facts which was filed in this proceeding on February 23, 1943, signed by you under oath. That is your signature, is it not?

A. Yes.

Q. Subscribed and sworn to on February 17, 1943? A. Yes.

Q. I refer you to Answer B, wherein you state to the best of the answering defendant's knowledge the document was signed on or about January 8, 1941; is that correct?

A. I was of the impression it was before the deal was consummated.

Q. Before it was consummated? A. Yes.

Q. That is your impression? A. Yes.

Q. Well, now, when did the negotiations for the deal begin, Mr. Bercut?

(Testimony of Peter Bercut.)

A. Along about sometime in December, 1940.

Q. And was the occasion upon which you signed this letter of resignation after the commencement of the negotiations with Mr. Arnold? A. Yes.

Q. But you say it was before they were actually completed, is that right?

A. When I saw that there was a possibility of [223] making the deal, I wanted to make sure I was not a director, because I had resigned to Mr. Arnold orally, and I wanted to be sure it was in writing.

Q. Do you recall signing any letter of resignation to Pacific Empire Corporation of the character that you read here?

A. No, I thought the two of them were the same.

Q. You say you resigned on or about March 30, 1940, by telling Mr. Arnold that you were not going to be a director? A. That is right.

Mr. Naus: He said about April.

Mr. Scampini: Q. About April?

A. About April.

Q. Why did you make that statement to Mr. Arnold?

A. We had difficulty between us two.

Q. What was the difficulty?

A. Well, they were rather personal. I loaned him \$2,000?

Q. Give us all the facts.

A. He kept it some time and I asked him later on about it, and he finally gave me half of it back,

(Testimony of Peter Bercut.)

and then I pressed him some more, and he gave me the other half, and he gave me his postponed check; and things did not look good to me any more, and I said I had better resign from these companies, they didn't look good to me.

Q. What companies are you referring to?

A. I was referring to the two companies. That is why I pressed him at that time.

Q. At this time you were director of the Merchants Ice & Cold Storage Company on or about April, 1940?

A. Yes.

Q. When had you become a director of Merchants Ice & Cold Storage Company?

A. Oh, about two years there.

Q. Two years before?

A. Yes.

Q. You attended the meetings of the directors of the Merchants Ice & Cold Storage Company?

A. Yes. [224]

Q. As a matter of fact, they held meetings, in fact, as your counsel would say, every month?

A. Yes.

Q. You would attend all of those meetings?

A. I was interested.

Q. You were very much interested in the Merchants Ice & Cold Storage Company?

A. Yes.

Q. You were observing how it was improving its position during those two years, weren't you?

A. I did not observe the improvement, but I observed it could be improved.

(Testimony of Peter Bercut.)

Q. Did you ever make any suggestion to the board of directors or at a meeting of the board of directors for the purpose of changing the management of the Merchants Ice & Cold Storage Company so that it could improve?

A. Well, I was new as a director, and I was not the one who was going to tell them how to do it.

Q. Did you ever do anything?

A. Oh, yes.

Q. What did you say?

A. Well, I helped in some things. For instance, Arnold was going to do some business with Moffitt and could not succeed, and so I went there and got some business, and I put the deal over for him.

Q. During the latter part of 1940 the financial condition of the Merchants Ice & Cold Storage Company, according to your counsel, became somewhat aggravated and acute, is that correct?

A. Mr. Arnold put through these reports, and they were so covered that it looked fairly good to the directors, and I was of the impression that it was at the time, but when I took my report to my office and had it analyzed by my accountant, he said, "This thing is not"—

Q. Not so good? A. Not so good.

Q. When were you first told that by your accountant? [225]

A. Well, from the time he first saw the report, he said that.

Q. In other words, you knew for two or three years? A. Yes.

(Testimony of Peter Bercut.)

Q. Did you ever do anything to change it?

A. I was not managing it.

Q. I asked you, Did you ever do anything to change it?

A. I wish I could have done it. I helped every time I was asked.

Q. I asked you, Did you ever do anything as a director of the Merchants Ice & Cold Storage Company or the Holding Company or Pacific Empire Corporation to bring about the change in that?

A. What could a director do? I did the best I knew, but I was not very much help; I was only one of seven directors.

Q. You and Mr. Maffei and Mr. Arnold for a period of years in fact had been running and managing the affairs of the Pacific Empire Holdings and Pacific Empire Corporation——

A. No.

Q. ——and Merchants Ice & Cold Storage Company, weren't you?

A. No.

Q. How much did you have to do with it?

A. I signed in the book when they asked me every six months or so.

Q. In other words, wherever your signature appears in the minute book of the Pacific Empire Holdings as being present and approving the acts and deeds of the officers and directors you would say you were not there?

A. I am sorry to say I was not there.

Q. Would you say that you would sign the minutes as they brought them to you?

(Testimony of Peter Bercut.)

A. Yes.

Q. Did you read the minutes? A. No.

Q. You signed without reading them?

A. I made a mistake, I admit.

Q. Did you do that all the time?

A. All the time.

Q. From the very beginning of your position in the company to the very end?

A. Practically, yes. [226]

Q. In other words, you would approve whatever Mr. Arnold and Mr. Maffei did without ever looking into it? A. Yes.

Q. That is how you performed your duties as director, is that right?

A. That is right. I am a very busy man.

Q. Did you perform the same function with the Pacific National Bank of San Francisco?

A. No; they called the meeting, and sometimes I am there, and sometimes the day of the meeting I would not be there.

Q. Did you approve the meetings of the directors in the same way?

A. Well, I think with these organizations, Mr. Arnold, it looked to me like he was just winding up something which was dead.

Q. You did not care how he took it up?

A. Oh, no.

Q. Do you know how much the Holding Company owed on or about March 31, 1940?

A. Which company?

(Testimony of Peter Bercut.)

Q. The Holding Company, Pacific Empire Holdings.
A. How much they owed?

Q. Yes. A. I don't know.

Q. Did you make any effort to find out?

A. If I did, I would not know anyway.

Q. You would not know anyway?

A. They would not tell me.

Q. In the financial reports that Mr. Arnold put out to the stockholders of the Pacific Empire Holdings, the last one being in May or June of 1940, would you read the financial report? A. Yes.

Q. Then you knew how much the company owed?

A. I knew they were no good.

Q. You would send them out to the stockholders?

A. When I got it, I took it to my office and had it analyzed, and the accountant told me the whole thing was bogus. [227]

Q. What did you do about protecting yourself?

A. I resigned.

Q. When did you resign?

A. I answered that already.

Q. I ask you again, when.

A. I told you, I made a statement as a witness that I resigned about April, 1940.

Q. Now, the same situation prevailed in Merchants Ice & Cold Storage Company, did it?

A. They had meetings anyway.

Q. The same situation prevailed in Merchants Ice & Cold Storage Company?

A. Very much so.

(Testimony of Peter Bercut.)

Q. You did not resign from Merchants Ice & Cold Storage Company?

A. I did not say that I would not.

Q. But you did not?

A. I did not so far.

Q. How did you become a director of Merchants Ice & Cold Storage Company?

A. I think Mr. Maffei and Mr. Arnold put my name up as a candidate.

Q. It was with your consent, wasn't it?

A. Yes.

Q. You agreed to it?

A. I was just proposed and accepted.

Q. You were also an officer besides a director of the Holding Company and Pacific Empire Corporation?

A. At the time that I became a director in the Merchants Ice & Cold Storage Company.

Q. You were vice-president of both of those companies? A. Yes.

Q. Did you resign as vice-president of the Pacific Empire Holdings?

A. Well, I had a verbal resignation, but it did not appear in writing upon the books.

Q. In other words, you just saw Mr. Arnold and said, "I do not want to have anything more to do with the Holding Company or the Pacific Empire Corporation"? A. Yes.

Q. You did not tell Mr. Maffei that?

A. No, I had difficulty seeing Maffei. I asked

(Testimony of Peter Bercut.)

for Maffei every time I went there, and they said, "He is not here" or "He is busy." [228]

Q. Did you ever tell any of the directors that you had resigned?

A. Well, I never talked with any of the directors.

Q. The answer is "No"?

A. No, I did not tell any of the directors. I hoped Mr. Arnold would tell them.

Q. But you never did?

A. No, I did not say that.

Q. In minute book No. 5, at page 100 of the minutes of the Pacific Empire Holdings, Inc. there is reported a meeting of Pacific Empire Holdings, Inc. held October 17, 1940, at which it is stated that the following members were present and acting: M. Maffei, L. R. Arnold and Peter Bercut. Do you recall any such meeting? A. No.

Q. You were not there? A. No.

Q. So you would say that these minutes are false, is that right? A. Yes.

Q. You were not, you say, a director of the Holding Company on that date? A. No.

Q. But you had not made a written resignation?

A. What was the date of that?

Q. October 17, 1940.

A. Did I sign those minutes?

Q. No, you did not. When did you first become associated with Pacific Empire Holdings, Inc.?

A. I think I was with the Calitalo.

Q. That was away back in 1931 or 1932?

(Testimony of Peter Bercut.)

A. Yes.

Q. You were director of the Holding Company when they took over this stock of Stratton, Vincent and McInerney? A. I think I was.

Q. And of course you know it cost around \$300,000 or \$400,000 for that block of stock, don't you? A. No.

Q. What did it cost?

A. Well, I understood it cost 50,000.

Q. You understood? A. I know it. [229]

Q. Will you please state how you know it cost around \$50,000?

A. Well, the stock was bought from the Anglo Bank, and I found out later that they paid 50,000.

Q. Let us see if I understand. Whom did it cost 50,000—Vincent and Stratton? A. Yes.

Q. I am talking about the Holding Company; what did the Holding Company pay them?

A. I thought the question was that you meant the original cost.

Q. The original cost to Vincent and Stratton?

A. Yes.

Q. You mean they bought it for \$50,000?

A. And they wrote it down in the books for \$250,000.

Q. Vincent, Stratton, McInerney and Sherman while you were an officer and director sold the stock to the Holding Company?

A. Yes, they did that themselves.

Q. But you approved the minutes, didn't you?

(Testimony of Peter Bercut.)

A. Well, I suppose I did. I am sorry I did.

Q. The minutes show that is what you approved, isn't it?

A. Well, when men like this are making a deal, and I am a director, I approve them, and that is all I was there for, to approve.

Q. You were quite a big stockholder in the Holding Company, weren't you?

A. Yes, sir.

Q. How many shares did you own?

A. I think about 15,000.

Q. You were a stockholder in Pacific Empire Corporation, too, were you not?

A. They changed the name and I became a stockholder.

Q. You were a stockholder of the City National Bank originally, weren't you? A. Yes.

Q. You changed that stock for Pacific Empire Corporation? A. Yes.

Q. That is how you became an officer and director of Pacific [230] Empire Corporation?

A. I changed my stock.

Q. You lost thousand of dollars by the management of the directors?

A. They never had anything; they just took the money from the stockholders.

Q. Of course, all these companies were looted?

A. They looted me.

Q. Were you a stockholder of Merchants Ice & Cold Storage Company when you became a director?

(Testimony of Peter Bercut.)

A. Yes.

Q. How many shares did you own?

A. I think 2,000.

Q. You got them from Frederick Vincent?

A. No, I got them from you.

Q. You mean I filed suit for you and got the stock for you? A. Yes.

Q. It was against Frederick Vincent, and that is how you got it?

A. Mr. Maffei told me you were the only person who knew where the stock was hiding.

Q. He was right?

A. He must have been.

The Court: We will take a short recess.

(After recess:)

Mr. Pardini: If your Honor please, the defendant Maffei is engaged in work, which is the selling of fruit, and he would like to be absent from the session, but he will be subject to call if either party wants him.

The Court: Is that agreeable?

Mr. Scampini: That is agreeable.

Mr. Naus: That is agreeable.

The Court: Very well.

Mr. Scampini: Q. You stated, Mr. Bercut, that you had difficulty with Mr. Arnold. Have you told all of the difficulty that you had with Mr. Arnold?

A. Yes. [231]

Q. Is that all?

A. Well, he was hard to find. Sometimes he was

(Testimony of Peter Bercut.)

there and they would say he was not there, things I did not like.

Q. The only real difficulty that you had, you say, with Mr. Arnold was that he owed you money?

A. Yes.

Q. That is the only one?

A. Yes; I don't know of any other.

Q. Did Mr. Arnold ever visit you at your packing plant up at Sacramento during the latter part of 1940?

A. No, I think it was in 1939.

Q. What was he doing up there when he came up to visit you?

A. He was just interested in my activities and I showed him the plant.

Q. Was he doing some work for you?

A. No.

Q. Did he ever do any bookkeeping for you?

A. No.

Q. You and Mr. Arnold were very close, weren't you?

A. No.

Q. Didn't you discuss your mutual problems together?

A. No.

Q. Are you sure you never did?

A. No, my problems, I did not discuss them with Mr. Arnold.

Q. Didn't you discuss the problems of the Holding Company with him?

A. No, except he told me once in a while that McInerney was making trouble for him; that is, he said McInerney was threatening him, and he was

(Testimony of Peter Bercut.)

getting nervous, and he said, "I owe him \$10,000 and he threatens to foreclose," and I said, "Well, if you get four men with myself I am willing to put up \$2,000 for you," and I tried to straighten him out on that, and then I myself got the worst of it.

Q. In the latter part of 1939, or rather 1940, did he visit you often at the packing plant at Sacramento? A. No, he only did once.

Q. He was only there once? A. Yes. [232]

Q. By the end of 1940 isn't it a fact that the only assets, substantial assets, that the Holding Company and Pacific Empire Corporation had left was this block of stock in Merchants Ice & Cold Storage Company?

A. They never had anything at any time.

Q. In the latter part of 1940 they had this block of stock in Merchants Ice & Cold Storage Company, didn't they?

A. Apparently not; it was mortgaged.

Q. You mean to say it was pledged to the Pacific National Bank of San Francisco?

A. That is what I found out when I bought the stock.

Q. But you knew that all the company had left was this block of stock, didn't you?

A. No, I didn't know that. They had the laundry at Bakersfield.

Q. You knew that they had already sold half of the laundry, didn't you? A. No.

Q. You didn't know that? A. No.

(Testimony of Peter Bercut.)

Q. If the minutes indicate that you signed the approval of the sale to Mr. McInerney, do you say that you did not know anything about it?

A. Well, if it was in the minutes, I didn't know.

Q. Did you make any effort to find out what the company owned during the latter part of 1940?

A. No. My judgment was they owned nothing.

Q. Your judgment was that they owned nothing?

A. Yes.

Q. By that you mean that they did not own Merchants Ice & Cold Storage stock?

A. I knew there was a company without funds.

Q. You mean without assets?

A. Without assets, too.

Q. But you knew that the company owed a lot of money, didn't you? A. No.

Q. You didn't know about the loans that the Holding Company had [233] made? A. No.

Q. Did you make any effort to find out how much it owed?

A. No, that was not my business; that was Maffei's and Arnold's business, and Arnold was a liquidating man, that is what he was. I just knew that sooner or later that would be liquidated and he would be out.

Q. You also figured that sooner or later he would liquidate the block of stock in the Merchants Ice & Cold Storage Company?

A. I knew the whole thing would be liquidated, because there was no income into the place; it was

(Testimony of Peter Bercut.)

just a lot of expense, maintaining an office and employees, and to maintain something like that you have to have income, and if you do not have income the whole thing would be liquidated.

Q. Knowing that they had to liquidate the assets, did you as a director of the company make any effort to get the best possible price?

A. No, I was not the liquidating agent.

Q. You were a director?

A. I was a director and I was hoping to get out and did get out.

Q. When was it that Mr. Arnold or Mr. Maffei first approached you on this deal which took place on January 8, 1941?

A. I have already testified to that.

Q. State it again.

A. Sometime in December 1939.

Q. 1939 or 1940? A. 1940; pardon me.

Q. Who approached you? A. Arnold.

Q. What did he say?

A. Well, it started this way: that we had a stormy meeting at the Merchants Ice & Cold Storage Company. One of the directors made the statement that he was not satisfied with the management of the company, and there was only one man on this whole board that they thought could run this plant.

[234]

Q. Who was that man?

A. He said Peter Bercut.

(Testimony of Peter Bercut.)

Q. Who was that director that made that statement?

A. Mr. Schinneller. He was representing a certain amount of bondholders.

Q. Wasn't Mr. Morris, former president of the Bank of America, chairman of the board of directors at this time?

A. Mr. Morris was not president of the Bank of America—I think he was vice-president.

Q. Whom did he represent on the board?

A. I have not finished my answer.

Q. Whom did he represent?

A. You were asking me the question when Mr. Arnold first spoke to me and I was going to tell you.

Q. All right, proceed.

A. He said at that time, he told me, "You know, Mr. Schinneller made the remark at the last meeting" that I should be manager of the company, or something of that kind; so I said, "I am very sorry he said that, because it is nothing for me; I am not looking for a job, I am not looking for anything; I am satisfied to be one of the directors." Then he said, "We want to sell our stock, the majority stock or controlling stock," and I said, "Well, I don't know if I am interested or not." Well, he told me that he himself never made a success of it for fifteen years, and they could not make a success, and maybe I could. And I said, "What is your figure? What do you expect for it?" And he said, "\$50,000." And then negotiations stopped there, and I said, "I will let you know."

(Testimony of Peter Bercut.)

Then he called me again, and I went there, and he said, "Will you make an offer?" And I made an offer of \$35,000, and I went away again. And he called me again, and then I came up [235] and the third time that I came there was news that there was fraud in the butter or something of that kind; it was already in the estate, you know, and I heard about it, and I said, "This looks like a bad mix-up; I am going to stay out of it." And then he said he tried to settle the case himself so as to get me interested again, so he went down to the Bank of America and he offered to settle for \$38,000 if they gave him a long time to pay, a couple of thousand a month, in order to satisfy me. But anyway, I was not interested any more, so I went away for a whole month; I went to Los Angeles, and I stayed there a whole month, and then I came back and made inquiry about how much the loss would be, and he *told it* would be between \$30,000 and \$40,000, and I finally made an offer, and he took me down to the bank and gave me the stock and made the bill of sale and everything, and I thought that was all right, so I said, "Now you have all these matters settled between yourself and Mr. Maffei, and I want to see Mr. Maffei and tell him," and he said he had a perfect right, and they were willing and they would go all through the negotiations that would be necessary.

Q. Did you see Mr. Maffei? A. Yes.

Q. When Mr. Arnold first approached you he asked you for \$50,000? A. Yes.

(Testimony of Peter Bercut.)

Q. For all the stock or half the stock?

A. No, he told me all of the stock.

Q. 50,000 for all of the stock? A. Yes.

Q. Are you sure? A. Yes.

Q. Did he offer to sell you half of the stock for \$50,000? A. No.

Q. Why weren't you willing to accept the suggestion that you become president of the Merchants Ice & Cold Storage Company? [236]

A. My experience in business tells me unless you have control and you can't handle it without too much interference from people that have no experience, you cannot have success.

Q. When it was suggested that you become president, you would not be interested unless you had control of the Merchants Ice & Cold Storage Company; is that right? A. Yes.

Q. When Mr. Arnold approached you to buy this control, you say he offered to sell to you for \$50,000 and you made him an offer? A. Yes.

Q. How much did you offer?

A. \$35,000. I never changed.

Q. You, of course, felt when you were offering \$35,000 that you could not offer any more for that stock and make a good deal for Peter Bercut even at that?

A. In business dealings that I do I try to get the best price. Everybody advised me against it—my brother, my wife, my friends, even my attorney told me, "Stay away from this; you are looking for trouble; it is a bad mix-up."

(Testimony of Peter Bercut.)

Q. When you were negotiating with Mr. Arnold you were only interested in getting this block of stock at the least possible price that Mr. Bercut could get it for; is that right?

A. That is the way I do business.

Q. You were not interested in the Holding Company or Pacific Empire Corporation getting as much as they could for the stock, were you?

A. Yes, I was. I told Arnold at the time of the deal—he said he wanted to save something for the companies, so I said, “I give you the privilege of buying back 20,000 shares at 50 cents a share and give you two years to do that, and I am sure if I am successful the 20,000 would be worth more to you and your company than the whole thing today.” That was my statement. [237]

Q. Who inserted in the contract that was finally signed the clause that the option could not be assignable by the company?

A. The whole contract was discussed back and forth, and that was my suggestion that that 20,000 shares was for the benefit of the stockholders of the company.

Q. How did you expect the Holding Company to exercise the option when you made the statement that the Holding Company had nothing?

A. They could have something if it was successful.

Q. Why did you want to prevent the company from assigning the option?

(Testimony of Peter Bercut.)

A. Because I knew it would be a valuable asset to the company some day, and Mr. McInerney if he got it would not do any good for the company.

Q. You were quite sure when you got that block of stock that it would be worth some money?

A. I was going to try to make it worth some money.

Q. In your opinion that 65,860 shares of common and 12,495 shares of preferred stock, what is it reasonably worth today?

Mr. Naus: Object to it as immaterial what it is worth today.

The Court: I will allow it.

A. I am still buying stock for 50 cents.

Mr. Scampini: Q. I am asking you what in your opinion the 65,863 shares of common stock and 12,495 shares of preferred stock which you acquired by reason of this contract are reasonably worth today.

A. I have no way of knowing. It would be only a guess, and a guess is not any good.

Mr. Naus: The answer was he was buying that at 50 cents a share.

Mr. Scampini: But that does not determine the value of the stock. [238]

The Court: He says he does not know the value.

Mr. Scampini: Q. You don't know the value of the stock?

A. It all depends on how successful I will be in maintaining the business.

(Testimony of Peter Bercut.)

Q. For what price would you sell this stock, I am asking you?

A. If I were to sell it—I would not have bought it if I were to sell it; I did not buy it for speculation. I bought it to build a company that the stockholders would be proud of and could get something out of it.

Q. Would you take a million dollars for it?

A. No, I am not selling it today.

Q. You would not sell it for a million dollars?

A. Not selling it.

Q. You would not sell the stock for a million dollars, would you?

A. I don't think I would be doing justice to my stockholders by selling it.

Q. But you would not take a million dollars for that stock?

A. I don't think I will answer that.

Mr. Scampini: Might I ask that he answer?

The Court: It is speculative.

A. They are not offering me that money.

Mr. Scampini: Q. Who put that clause in the contract that in the event the company should exercise the option you could have a voting trust, a voting right for seven years?

A. For the same reason I said before, that unless I had free action, free management to be able to manage the business according to my own judgment, I could not do any good for the company.

Q. So you would not give the company an option

(Testimony of Peter Bercut.)

for 20,000 shares unless that option was not assignable and if exercised you had the voting right for seven years?

A. Well, I understand that [239] it is in the contract, but it could be revoked any time.

Q. I mean, that is the way you felt about it at the time?

A. I thought it would take seven years to make a success of it.

Q. How much did the Merchants Ice & Cold Storage Company earn in 1942, in profit?

A. That is a matter of accounting. My bookkeeper can answer that.

Q. Have you any information; do you know?

A. I would not know at all. You put my accountant on the stand and he will tell you everything.

Q. It is true, is it not, that as soon as you went into the management of the Merchants Ice & Cold Storage Company that the company began to prosper?

A. Not that soon.

Q. How long? Two or three months?

A. The time that it takes to do business and put confidence into your company, and notify the customers that they will be taken care of by somebody that is responsible.

Q. But the company began to improve soon after you got in?

A. As I expected it would.

Q. You expected it would when you were negotiating for this block of stock?

(Testimony of Peter Bercut.)

A. I was going into a business that I expected to make a success of. I am not in the habit of making a failure.

Q. In other words, when you were negotiating for this block of stock you were of the opinion that it would have an increased value with a change in management?

A. I don't think I would have bought it if I didn't think so.

Q. Did you make any effort while you were director of the Merchants Ice & Cold Storage Company and the Holding Company and the Pacific Empire Corporation and an officer of them to bring about a change in the management?

A. I will tell you [240] this: If a man was what you would call I will say a genius, if you want to, for that purpose, unless he is free to do business he can't do anything. Suggestions do not make any help. If I would say, "This is best for your business," you would not do it anyway.

Q. I asked you, Mr. Bercut, whether while you were a director and officer of the Holding Company and of the Pacific Empire Corporation and of the Merchants Ice & Cold Storage Company prior to the time that you got the block of stock from Mr. Arnold, did you make any effort to bring about a change in the management of the Merchants Ice & Cold Storage Company so that it could improve its condition?

A. No, Mr. Arnold and Mr. Maffei put me there

(Testimony of Peter Bercut.)

and I was not going to try to place them out; I had plenty to do otherwise. If I did not have the Merchants Ice & Cold Storage Company it would have been all right.

Q. In other words, you were perfectly willing to let things go along as they were as long as you did not own a majority of the stock?

A. Not exactly. I feel that unless you are asked to suggest and they want you to help, there is no reason to impose yourself on other people's management.

Q. You remember when Mr. Scampini resigned from the Pacific Empire Corporation in 1936, don't you?

A. No. I did not even know you were ever a director.

The Court: We will take a recess now until two o'clock.

(Thereupon a recess was taken until 2:00 p. m. this date.) [241]

Tuesday, May 4, 1943—2:00 P. M.

PETER BER CUT,

recalled.

Direct Examination
(resumed)

Mr. Scampini: Q. Mr. Bercut, who was present at the time that the agreement dated January, 1941, was made, and where was the agreement dated Jan-

(Testimony of Peter Bercut.)

uary 8, 1941, actually signed, that is, Plaintiff's Exhibit No. 22?

A. It was signed up at the office at 26 O'Farrell Street.

Q. Who was present?

A. Maffei and Arnold and myself.

Q. Why did you not sign at the bottom, "Accepted and approved"?

Mr. Naus: Mr. Scampini, you mean on that particular paper, or all the papers? There was more than one copy, I understand.

Mr. Scampini: I don't know.

A. Only the seller has to sign. I am not the seller. I have not to sign.

Q. How many copies did you sign?

A. Only one.

Q. That is this one here?

A. I think so.

Q. Was Mr. Maffei there at the time?

A. Yes.

Q. Did Mr. Maffei sign this letter of agreement outside of your presence? A. No.

Q. What was said at the time that you and Mr. Arnold and Mr. Maffei signed this agreement?

A. Mr. Maffei wished me good luck. He said, "I hope for your good success."

Q. What did Mr. Arnold say?

A. The same thing.

Q. What did you say?

A. I don't remember exactly. There was a con-

(Testimony of Peter Bercut.)

versation, but I can't recall the exact words. It was something to that effect. I think one thing I remember that Arnold said was, "I suppose my job goes with it, too."

Q. What did you say?

A. I said, "Yes, I couldn't use you." [242]

Q. How much did you pay for this block of stock?

A. \$35,000.

Q. Of that, \$25,000 was paid back to the Merchants Ice & Cold Storage Company, is that right?

A. Yes. I didn't tell them how to use the money when I paid it, but he said that \$25,000 should go to the Merchants.

Q. It is specified in the contract, isn't it?

A. I inquired why, and he said, "I want to make them a present."

Q. Make a present?

A. So I said, "Well, I don't understand what you mean as a present," and he gave me to understand that they owed that much money that they had drawn from the other business.

Q. Is that the first time you found out that the Holding Company had drawn money from the Merchants Ice & Cold Storage Company?

A. Yes.

Q. When you went in there had you investigated the books to see what it was, the relationship between the Merchants Ice & Cold Storage and the Holding Company?

A. I never investigated any books. I had an accountant do this.

(Testimony of Peter Bercut.)

Q. Did your accountant make any report to you?

A. Yes.

Q. Did you find any indebtedness owing to the Merchants Ice & Cold Storage Company from Mr. Arnold?

A. Well, it took months to find out that there were some charges, that it was charged back to the company. That was all an accounting business.

Q. When your accountant got through, how much did you find that Mr. Arnold had drawn down from the Merchants Ice & Cold Storage Company?

A. Quite a lot of money, but I will leave that to the accountant.

Q. That was many thousands of dollars, was it not?

A. Yes.

Q. Mr. Arnold had taken that money for his personal account, hadn't he?

A. I don't know. When we found an interest [243] charge to the Merchants, we promptly wrote a letter to Mr. Arnold to see which company would be charged with that amount.

Q. Mr. Bercut, isn't it a fact that you found many, many checks issued by the Merchants Ice & Cold Storage Company to Mr. Arnold and endorsed by him?

A. I didn't look over the checks myself.

Q. Did you ever hear anything about it?

A. No. The business was between the companies, that is what I understand.

Q. As a matter of fact, you found that Mr.

(Testimony of Peter Bercut.)

Arnold had taken money from the Merchants Ice & Cold Storage Company and then charged it to the Holding Company, didn't you?

A. No, I didn't find anything. I have a book-keeper and accountant, and you can put him on the stand and he will tell you all about it, because I can't testify to something I don't know.

Q. Who was on the board of directors of the Merchants Ice & Cold Storage Company—I mean now?

A. I think mostly all of the same directors—Mr. Schinneller, if I can remember. Mr. Anderson—well, I don't know. We have a list of them.

Q. Mr. Morris is still a director of the company?

A. No.

Q. When did he cease being a director?

A. When I came in.

Q. State the circumstances under which he ceased being a director of the company.

A. Well, he was too expensive. He charged \$250 a month for a member of—what do you call it?

Mr. Naus: Q. Chairman of the board?

A. Chairman of the board. And I knew that the company could not afford it, and I told him he was all through; it was not for myself, the company could not afford it.

Mr. Scampini: Q. Was there a meeting between you and Mr. Morris and Mr. Arnold at the Commercial Club? Is that this transaction?

A. Yes, that is where I told Mr. Morris. [244]

(Testimony of Peter Bercut.)

Q. What else did you say to Mr. Morris at that time?

A. Well, we had a conversation, but I don't recall what was said.

Q. Do you remember anything besides that which you have just told us?

A. Well, that would be a conversation that I would not remember the exact words.

Q. Let me see if I can refresh your memory. At this meeting is it or is it not true that you advised Mr. Morris of the fact that you had acquired the controlling interest in Merchants Ice & Cold Storage Company?

A. He knew about it; I didn't tell him. Arnold told him.

Q. At this meeting is it or is it not true that you stated to Mr. Morris that you and Mr. Morris and Mr. Arnold could make a lot of money by buying the stock cheap and the bonds cheap and conditions were going to improve and everybody would make some money?

A. No, I am not in that business. I did not buy the business to speculate on stock or bonds, because that is not my line of business.

Q. Is it or is it not true that you made that statement to Mr. Morris? A. No.

Q. You say you did not make that statement?

A. No.

Q. You are sure of that? A. Yes.

Q. Is it or is it not true that Mr. Morris said to you he did not do business that way?

(Testimony of Peter Bercut.)

A. Nothing like that took place. I don't do business that way either.

Q. Have you been acquiring any other stock of the Merchants Ice & Cold Storage Company since you became president down there?

A. Yes, sometimes.

Q. How many thousands of shares have you picked up? A. I would not know.

Q. Quite a few, haven't you? A. Yes.

[245]

Q. Both common and preferred, haven't you?

A. When somebody offers it I make an offer for it, and if they give it to me I take it.

Q. You put in a bid for it as cheaply as you possibly can get it; is that right?

A. No, I do not put in any bid. They offer the stock to me and I say I will give so much, and if they do not give it to me they give it to somebody else.

Q. Who is the broker who picks up the stock for you?

A. I have no broker. The brokers call me.

Q. As a matter of fact, haven't you done a lot of business through the brokerage firm of F. M. Brown & Company? A. No.

Q. Have you done some business through them?

A. I think I bought one small block.

Q. Have you picked up quite a few bonds since you became president down there?

A. I bought some.

(Testimony of Peter Bercut.)

Q. You bought them on the market?

A. Yes.

Q. At what price?

A. Well, I bought the first at 55, and then they have gone up practically—they are par now.

Q. Every time you had an opportunity to buy some bonds you would pick them up, wouldn't you?

A. Yes.

Q. I thought you made the statement that you did not engage in business like that.

A. That is an investment, and I know when I am running a business how the business is conducted, and it is a safe place for me to invest.

Q. From whom have you bought bonds?

A. Whoever offered them to me.

Q. Did you buy them from F. M. Brown & Company?
A. From F. M. Brown & Company?

Q. You have a standing order with F. M. Brown & Company to buy bonds for you, haven't you?

A. No. [246]

Q. Have you any standing order to buy preferred stock?
A. No.

Q. F. M. Brown & Company have executed quite a few orders for you, haven't they?

A. They did not buy any stock for me; they bought bonds for me.

Q. When did you first start to accumulate, buy up some of these bonds?
A. A long time.

Q. As soon as you got in there as president?

A. Not as soon as I did, no.

(Testimony of Peter Bercut.)

Q. Soon thereafter? A. Soon thereafter.

Q. The company itself was showing good prospects, is that right?

A. Well, I hoped it would after I run it, and usually it does all right.

Q. If you were not running it, it would not do so well, would it?

A. No. I put in a lot of time running that business.

Q. How much experience did you have in the cold storage business before you took over the management?

A. All my life I have dealt with merchandise kept in storage or otherwise.

Q. Have you ever run a cold storage plant?

A. No.

Q. This is the first time?

A. As a business that is all in the same line.

Q. The business was there, wasn't it?

A. No.

Q. Just a case of management?

A. No, the business was not there.

Q. Did you bring in some new business?

A. Yes.

Q. How much business did you bring in?

A. Well, it is all accounted for; you can see it in the books.

Q. Why didn't you bring the business in when you were a director?

A. When I was a director, suppose I went to

(Testimony of Peter Bercut.)

Swift & Company or Armour & Company, they would want to find out the condition of the premises, and who was managing the company, and how much [247] money they had in the bank, and they would demand a report—what you call a statement—to see if their merchandise is going to be safe, the bills will be paid and the cold storage allowed to run; and where the P. G. & E. threatened to close the account, and the butter didn't appear promptly, and that made it very bad, and as a director I could not say to the company, "Everything is going to be all right," they would not give me much business.

Q. Mr. Bercut, I ask you, Why didn't you have the same interest to stimulate business for the company so long as you were only a director as you have now that you own or control the company?

A. I did not have the say.

Q. You did not have the same interest, did you?

A. I don't see what you mean by that. I was wishing that the business would be good; I had some money in it, and I was a stockholder. I was hoping that they would make it good.

Q. You also had a lot of money in the Holding Company, didn't you?

A. I forgot about that a long time ago. I figured it was lost.

Q. You were also a representative of the stockholders of the Holding Company, weren't you?

A. I protected them as much as I could on that deal.

(Testimony of Peter Bercut.)

Q. What did you do to protect the stockholders?

A. I told Mr. Arnold that the 20,000 shares would be worth more in two years than the whole thing was worth at the time I bought it.

Q. You gave him an option that you knew they could not exercise; is that right?

A. I didn't know that.

Q. You knew what the financial condition of the company was? How could they exercise the option?

A. I prevented them [248] from selling it to the stockholders, because I was protecting the stockholders, like I testified to this morning. I did not want the stock to go into the hands of Mr. McInerney or some people who would not do anything for the company.

Q. Is that the extent of your protection for the stockholders of the Pacific Empire Holdings? Is that the extent?

A. What more could I do?

Q. Mr. Bercut, you could have gone in and managed the Merchants Ice & Cold Storage Company without buying the stock, couldn't you?

A. No, I could not run the Merchants Ice & Cold Storage Company without having some say, some responsibility.

Q. They offered you to be president, didn't they?

A. That isn't all they needed.

Q. You had to have control before you went in and managed it?

A. I guaranteed to the bank—in order to get

(Testimony of Peter Bercut.)

further bank credit I guaranteed credit to \$90,000 or \$100,000.

Q. Why didn't you guarantee before you got control of the stock?

A. I couldn't guarantee somebody else's business. What would you do? Is it good business to do that?

Q. You mean you guarantee it now because you think it is your own business?

A. No, because everything is going to be all right; there is going to be no more loss in butter, and I put it on a business basis.

Q. Why didn't you put the affairs of the Holding Company and the Pacific Empire Corporation on a business basis?

A. I was not the manager; I had nothing to do with it.

Q. You were one of the directors.

A. But that doesn't make me manager.

Q. Did you ever make an effort to improve the business conditions of the Holding Company so long as you were an officer or director? [249]

A. I didn't know what business they had.

Q. You did not make any effort to find out when you were an officer or director?

A. All that company was was a company without any money and without any business.

Q. But you felt by giving them an option back on 20,000 you were protecting the stockholders of the Holding Company, is that it?

(Testimony of Peter Bercut.)

A. That is right.

Q. Why didn't you give them an option back to buy some of the preferred stock?

A. I didn't do that.

Q. Why didn't you offer it, if you were protecting the stockholders?

The Court: The ultimate fact is he did not do so.

Mr. Scampini: Q. When you got into the Merchants Ice & Cold Storage Company did you find there 500 shares of stock of the Frostrcraft Corporation? A. No.

Q. Didn't the Merchants Ice & Cold Storage Company own 500 shares in Frostrcraft Corporation?

A. I do not think so, but you can find out from the accountant.

Q. Do you now own 500 shares of Frostrcraft Corporation? A. No.

Q. Are you sure you do not own it?

A. No, I don't.

Q. You are positive?

A. I don't think I own it.

Q. At the time you became president of the Merchants Ice & Cold Storage Company you did not find 500 shares of Frostrcraft in the treasury of the company and transfer it over to the name of yourself and Henri Bercut?

A. I don't remember exactly. Any transaction of that kind would all be in the books.

Q. Have you got the earnings statement of the

(Testimony of Peter Bercut.)

Merchants Ice & Cold Storage Company for the years 1941 and 1942?

A. I think my attorneys have it.

Mr. Scampini: Counsel has handed me a Merchants Ice & Cold [250] Storage profit and loss statement as of December 31, 1941 and one as of December 31, 1942, and I will ask that they be marked as exhibits next in order for identification for plaintiff.

(Profit and loss statement of December 31, 1941, marked "Plaintiff's Exhibit 28 for Identification"; profit and loss statement of December 31, 1942, marked "Plaintiff's Exhibit 29 for Identification.")

Mr. Scampini: Q. Mr. Bercut, I show you here what your counsel turned over to me as the profit and loss statement of the Merchants Ice & Cold Storage Company for the year ending December 31, 1941, Plaintiff's Exhibit No. 28 for identification, in which for that year's operation there is reported a net profit before depreciation of \$79,782.43, and after provision for depreciation it amounts to \$75,286.93, and you still show a net profit for the year of \$4,495.50. Is that the actual earnings of the company for that year, to the best of your knowledge?

A. Yes.

Mr. Scampini: I ask that this be marked as plaintiff's exhibit next in order in evidence.

The Court: Let it be admitted and marked.

(Plaintiff's Exhibit 28 for identification was received in evidence.)

(Testimony of Peter Bercut.)

PLAINTIFF'S EXHIBIT No. 28

Merchants Ice and Cold Storage Company

PROFIT AND LOSS STATEMENT

AS OF DECEMBER 31, 1941

Operating Revenues:

Storage	\$384,812.86
Ice Sales	52,924.75
Rent, Power Sales, Misc.....	15,861.65

Total Operating Revenues.....	453,599.26
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Operating Expenses:

Labor	161,845.68
Power, Light, Water.....	42,002.43
Maintenance, repairs	10,037.00
Taxes	28,935.47
Insurance	8,017.26
Salaries: Officers, Clerks.....	21,698.99
Provision for uncollectible accounts..	21,823.06
Miscellaneous	288.70

Total Operating Expenses.....	294,648.59
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Administrative Expenses:

Soliciting, Automobiles, Misc.....	5,158.04
Miscellaneous, Stationery, Telephone & Telegraph, etc.....	9,874.74

Total Administrative Expenses.....	15,032.78
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Total Expenses	309,681.37
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Profit from Operation Before Depreciation.....	143,917.89
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(Testimony of Peter Bercut.)

Other Income Credits:

Dividends	1,473.20
Miscellaneous credits	4,191.64

Total	5,664.84
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Gross Income Before Depreciation.....	149,582.73
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Other Income Charges:

Bond Interest	42,867.50
Other Interest	6,429.68
Amortization of bond discount & expense	4,348.14
Uncollectible notes written off.....	13,399.45
Miscellaneous losses on equipment, etc.	2,755.53

Total	69,800.30
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Net Profit Before Depreciation.....	79,782.43
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Provision for Depreciation.....	75,286.93
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Net Profit for Year.....	4,495.50
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[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339.
Filed 5-4-43. Walter B. Maling, Clerk. By J. P.
Welsh, Deputy Clerk.

Mr. Scampini: Q. I show you here Plaintiff's Exhibit 29 for identification, which appears to be a profit and loss statement for the year ending December 31, 1942, wherein it is reported that the net profit before depreciation for that year amounted to \$233,526.66, and after allowing \$77,124.68 for depreciation you still show a net profit of \$156,401.98.

(Testimony of Peter Bercut.)

Is that the correct profit earned by the company that year? A. Yes.

Q. After all charges; is that right?

A. Yes. [251]

Mr. Scampini: Now I ask that this be marked plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Plaintiff's Exhibit 29 for identification was received in evidence.)

PLAINTIFF'S EXHIBIT No. 29

Merchants Ice and Cold Storage Company

PROFIT AND LOSS STATEMENT FOR THE YEAR

ENDING DECEMBER 31, 1942

Operating Revenues:

Storage	\$744,286.52
Ice Sales	66,863.93
Rent, Power Sales, Etc.....	35,670.61

Total Operating Revenues.....	846,821.06
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Operating Expenses:

Labor	324,880.31
Power, Light, Water.....	52,381.59
Maintenance, repairs	15,412.41
Taxes	38,185.73
Insurance	10,168.96
Salaries: Officers, Clerks.....	29,169.76
Uncollectible accounts, miscellaneous.....	6,378.47

Total Operating Expenses.....	476,577.23
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(Testimony of Peter Bercut.)

Administrative Expenses:

Soliciting, Automobiles	\$ 3,258.46
Miscellaneous Stationery, Telephone & Telegraph, Etc.	24,837.81

Total Administrative Expenses.....	28,096.27
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Total Expenses	504,673.50
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Profit From Operations Before Depreciation.....	342,147.56
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Other Income Credits:

Dividends	1,104.88
Miscellaneous credits	1,018.05

Total	2,122.93
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Gross Income Before Depreciation.....	344,270.49
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Other Income Charges:

Bond Interest	41,067.16
Other Interest	2,439.24
Amortization of bond discount and expense.....	4,150.34
Miscellaneous losses on accounts receivable and equipment, etc.	63,087.09

Total	110,743.83
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Net Profit Before Depreciation.....	233,526.66
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Provision for Depreciation.....	77,124.68
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Net Profit for Year.....	156,401.98
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[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339.
 Filed 5-4-43. Walter B. Maling, Clerk. By J. P.
 Welsh, Deputy Clerk.

(Testimony of Peter Bercut.)

Mr. Scampini: Counsel has handed me a profit and loss statement as of December 31, 1940, wherein it is reported that the net income before depreciation was \$19,901.57, and after providing the sum of \$73,916.01 for depreciation the net loss was \$54,014.44. Is that, to your knowledge, a correct report of the earnings of the company for that year?

A. Yes.

Mr. Scampini: I will ask that be marked plaintiff's exhibit next in order.

(Profit and loss statement of December 31, 1940, marked "Plaintiff's Exhibit 30.")

PLAINTIFF'S EXHIBIT No. 30

Merchants Ice and Cold Storage Company

PROFIT AND LOSS STATEMENT

AS OF DECEMBER 31, 1940

Operating Revenues:

Storage	\$295,742.99
Ice	58,235.77
Power Sales	1,342.86
Rent, Miscellaneous	16,029.23

Total Operating Revenues.....	371,350.85
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Operating Expenses:

Warehouse Labor	97,591.87
Engine Room Labor.....	13,091.23
Tank Room Labor, Ice Dept.....	8,208.27
Labor, Maintenance, repairs.....	12,799.41
Power, Light, Water.....	40,378.46
Maintenance, repairs	8,206.22
Taxes	22,828.65

(Testimony of Peter Bercut.)

Unemployment reserve, Payroll Taxes.....	\$ 4,583.93
Social Security Taxes.....	1,602.46
Compensation Insurance	2,863.27
Other Insurance	6,192.15
Salaries: Officers, Clerks.....	33,848.27
Cartage	124.63
Loss and Damage.....	6,580.46
Uncollectible Accounts	4,215.89
Rent	1,200.00
Power Sales Cost.....	1,379.39

Total Operating Expenses..... 265,694.56

Administrative Expenses:

Soliciting	3,249.35
Advertising	60.00
Automobiles	915.18
Officers, Expenses	2,791.90
Legal	2,644.80
Telephone and Telegraph.....	2,477.16
Postage	618.25
Stationery	2,180.77
Auditors	1,325.00
Miscellaneous Expenses	4,419.65
Loss and Damage.....	
Insurance	
Dues and Subscriptions.....	1,966.38
Administrative Expenses	3,542.16

Total Administrative Expenses..... 26,190.60

Profit From Operation Before Depreciation..... 79,395.69

Other Income Credits:

Dividends received	36.00
Salvage Sales	236.77

Total 272.77

Gross Income Before Depreciation..... 79,668.46

(Testimony of Peter Bercut.)

Income Charges:

Bond Interest	\$ 42,867.50
Other Interest	12,425.15
Amortization of reorganization expenses.....	4,348.14
Miscellaneous	150.00

Total	59,790.79
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Net Income Before Depreciation.....	19,901.57
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Provision for Depreciation.....	73,916.01
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Net Loss	54,014.44
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[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339.
 Filed 5-4-43. Walter B. Maling, Clerk. By J. P.
 Welsh, Deputy Clerk.

Mr. Scampini: Q. I show you here, Mr. Bercut, what counsel has delivered to me, and purporting to be a balance sheet of the Merchants Ice & Cold Storage Company as of December 31, 1940, showing total assets, aggregate assets, of \$2,059,524.98, and against that first mortgage bonds outstanding aggregating \$659,500, and mortgage payable other property \$11,300; current liabilities of \$187,540.01; rent received in advance, \$2,048.47; and the balance reflected by capital stock outstanding, preferred 7% cumulative 41,615 shares carried at \$416,150, and common stock without par value 107,188 shares outstanding carried at \$999,575, or a total capital stock of \$1,415,725, and a deficit in the

(Testimony of Peter Bercut.)

surplus of \$216,588.50. Is that a correct balance sheet of the company as of that date?

A. Who was that prepared by?

Q. I don't know. A. By my office? [252]

Q. Yes, it was delivered to me by your office.

A. It is all right, then.

Mr. Scampini: I will ask that this be marked as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Balance sheet of December 31, 1940, marked "Plaintiff's Exhibit 31.")

PLAINTIFF'S EXHIBIT No. 31

Merchants Ice and Cold Storage Company

BALANCE SHEET AS OF DECEMBER 31, 1940

Assets		Month of December
Plant Property and Equipment:		
Land	\$ 865,608.55	
Buildings, machinery and equipment.....	2,284,365.54	
Less reserve for depreciation.....	1,336,625.18	
	<hr/>	
	947,740.36	
Plant property and equipment.....	1,813,348.91	
	<hr/>	
Acme Ice Cream Co.:		
Land and buildings.....	28,185.53	
	<hr/>	
Investments in Securities.....	26,437.40	

(Testimony of Peter Bercut.)

	Month of December
Current Assets:	
Cash	\$ 2,918.93
Notes receivable	13,604.15
Accounts receivable	134,219.78
	<hr/>
	150,742.86
Less reserve for doubtful accounts.....	26,500.00
	<hr/>
Total Current Assets.....	124,242.86
	<hr/>
Due From Globe Brewing Co.....	27,995.68
Less reserve	15,000.00
	<hr/>
Total Due From Globe Brewing Co.....	12,995.68
	<hr/>
Deferred Charges:	
Unamortized bond discount and expense.....	28,230.76
Commission on sale of Preferred stock.....	11,063.57
Prepaid taxes	11,443.60
Prepaid insurance	3,576.67
	<hr/>
Total Deferred Charges.....	54,314.60
	<hr/>
Total	<u><u>\$2,059,524.98</u></u>

(Testimony of Peter Bercut.)

Liabilities		Month of December
First Mortgage 6½% Serial Gold Bonds.....	\$	659,500.00
Mortgage Payable Other Property.....		11,300.00
Current Liabilities:		
Notes payable, banks.....		98,199.58
Notes payable, other.....		5,771.89
Contracts payable		1,090.00
Accounts payable		30,462.24
Taxes payable, City and County.....		25,704.73
Accrued unemployment reserve for payroll taxes		4,271.54
Accrued Social Security taxes.....		656.74
Accrued Wages		3,958.34
Accrued bond interest.....		10,716.87
Accrued interest payable.....		2,331.99
Accrued Federal Income Taxes.....		1,912.50
Federal Income Tax assessment.....		1,713.59
Due on repurchase agreement for own Preferred Capital stock.....		750.00
Total Current Liabilities.....		187,540.01
Rent Received in Advance.....		2,048.47
Capital Stock:		
Preferred 7% Cumulative 41,615 shares outstanding		416,150.00
Common stock without par value, 107,180 shares outstanding		999,575.00
Total Capital Stock.....		1,415,725.00
Surplus as of March 31, 1941.....		216,588.50*
Total		\$2,059,524.98

*Indicates figures in red.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339.
 Filed 5-4-43. Walter B. Maling, Clerk. By J. P.
 Welsh, Deputy Clerk.

(Testimony of Peter Bercut.)

Mr. Scampini: Q. Now I show you what purports to be a balance sheet of December 31, 1941, and a comparison of it with the balance sheet of December 31, 1940, wherein the December 31, 1941, liabilities, current liabilities, have been decreased from \$187,540.01 to \$120,960.06, and the surplus deficit has been decreased from \$216,588.50 to \$212,093, the capital stock remaining the same at \$1,415,725 represented by the same number of shares that were outstanding on December 31, 1940. Is that a correct balance sheet for this year?

A. Yes.

Mr. Scampini: I ask that that be marked plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Balance sheet of December 31, 1941 and comparison with balance sheet of December 31, 1940, marked "Plaintiff's Exhibit 32.")

PLAINTIFF'S EXHIBIT No. 32

Merchants Ice and Cold Storage Company

BALANCE SHEET AS OF DECEMBER 31, 1941 AND COMPARISON WITH DECEMBER 31, 1940

	Assets	Month of December 1940	Month of December 1941
Current Assets:			
Cash	\$	2,918.93	\$ 13,727.22
Notes receivable		13,604.15	
Accounts receivable		134,219.78	153,568.10
		150,742.86	167,295.32
Less reserve for doubtful accounts		26,500.00	26,500.00
Total Current Assets.....		124,242.86	140,795.32
Investments in Securities.....		26,437.40	26,437.40
Investments in Other Properties.....		41,181.21	38,479.07

(Testimony of Peter Bercut.)

	Month of December 1940	Month of December 1941
Plant Property and Equipment:		
Land	\$ 865,608.55	\$ 865,608.55
Buildings, machinery, equipment.....	2,284,365.54	2,303,426.83
Less reserve for depreciation.....	1,336,625.18	1,411,556.94
	<u>947,740.36</u>	<u>891,869.89</u>
Plant Property and Equipment	<u>1,813,348.91</u>	<u>1,757,478.44</u>
Deferred Charges:		
Unamortized bond discount and expense	28,230.76	23,882.62
Commission sale of Preferred stock	11,063.57	11,063.57
Taxes applicable to future period	11,443.60	10,098.93
Prepaid insurance	3,576.67	5,405.18
	<u>54,314.60</u>	<u>50,450.30</u>
Total	<u>2,059,524.98</u>	<u>2,013,640.53</u>

Liabilities

Current Liabilities:

Notes payable, banks.....	\$ 98,199.58	\$ 85,000.00
Notes payable, other.....	5,771.89	
Contract payable	1,090.00	
Accounts payable	30,462.24	7,137.25
Taxes payable, City & County.....	25,704.73	10,098.93
Accrued unemployment payroll taxes	4,271.54	3,200.63
Accrued Social Security Taxes.....	656.74	558.07
Accrued Wages	3,958.34	3,126.80
Accrued bond interest.....	10,716.87	10,716.87
Accrued other interest.....	2,331.99	371.51
Accrued Federal-State Income Taxes	1,912.50	
Federal assessment	1,713.59	
Due on repurchase agreement for own Preferred Capital Stock.....	750.00	750.00
Total Current Liabilities.....	<u>187,540.01</u>	<u>120,960.06</u>

(Testimony of Peter Bercut.)

	Month of December 1940	Month of December 1941
Deferred Liabilities		\$ 3,000.00
Rent Received in Advance.....	\$ 2,048.47	1,448.47
Reserve for Contingencies.....		15,000.00
First Mortgage 6½% Serial		
Gold Bonds	659,500.00	659,500.00
Mortgage Payable Other Property..	11,300.00	10,100.00
Capital Stock:		
Preferred 7% cumulative 41,615		
shares outstanding	416,150.00	416,150.00
Common stock without par value		
107,180 shares outstanding.....	999,575.00	999,575.00
	<u>1,415,725.00</u>	<u>1,415,725.00</u>
Surplus as of December 31, 1941.....	216,588.50*	212,093.00*
Total	<u>2,059,524.98</u>	<u>2,013,640.53</u>

*Indicates figures in red.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339.
Filed 5-4-43. Walter B. Maling, Clerk. By J. P.
Welsh, Deputy Clerk.

Mr. Scampini: Q. I now show you a balance sheet of December 31, 1942, wherein the aggregate assets are valued at \$2,023,390.24, and current liabilities have been reduced to \$46,107.79; first mortgage bonds have been reduced to \$619,500, and the capital stock carried at \$1,415,725, evidenced by the same number of shares, and the surplus outstanding has been reduced to \$55,691.02. That is a

(Testimony of Peter Bercut.)

correct balance sheet for that year? A. Yes.

Q. Now, in 1943, beginning with January 1 to the present time, [253] is it not a fact that the operations of the Merchants Ice & Cold Storage Company show even greater profit than they show during the year 1942? A. Yes.

Mr. Scampini: I will ask that this balance sheet be marked plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Balance sheet of December 31, 1942, marked "Plaintiff's Exhibit 33.")

PLAINTIFF'S EXHIBIT No. 33

Merchants Ice and Cold Storage Company

BALANCE SHEET AS OF DECEMBER 31, 1942

Assets

Current Assets:

Cash	\$ 16,840.28
Accounts receivable	190,455.28
Accrued interest receivable on Corporation Bonds	56.23

207,351.79

Less reserve for doubtful accounts..... 26,500.00

Total Current Assets..... 180,851.79

Investments 26,437.40

Investments in Other Property..... 28,185.53

Plant Property and Equipment:

Land	865,608.55
Buildings, Machinery and Equipment.....	2,364,915.39
Less reserve for depreciation.....	1,488,681.62

876,233.77

Plant Property and Equipment..... 1,741,842.32

(Testimony of Peter Bercut.)

Deferred Charges:

Unamortized bond discount and expense.....\$	19,732.28
Commission on sale of preferred stock.....	11,063.57
Prepaid insurance	4,777.12
Taxes applicable to future period.....	10,500.23
Total Deferred Charges.....	<u>46,073.20</u>
Total	<u>2,023,390.24</u>

Liabilities

Current Liabilities:

Accounts payable	\$ 17,314.44
Taxes payable, City and County.....	10,500.23
Accrued unemployment payroll taxes.....	4,980.83
Accrued Social Security Taxes.....	2,123.98
Accrued bond interest.....	10,066.80
Accrued other interest.....	371.51
Due on repurchase agreement on own Preferred capital stock.....	750.00
Total Current Liabilities.....	<u>46,107.79</u>
Rent Received in Advance.....	1,848.47
Reserve for Contingencies.....	15,000.00
First Mortgage 6½% Serial Bonds.....	619,500.00
Less Bonds in Treasury.....	<u>28,000.00</u>
	<u>591,500.00</u>
Mortgage Payable Other Property.....	8,900.00

Capital Stock:

Preferred 7% Cumulative 41,615 shares outstanding	416,150.00
Common stock without par value 107,180 shares outstanding.....	999,575.00
	<u>1,415,725.00</u>
Surplus as of December 31, 1942.....	55,691.02*
Total	<u>2,023,390.24</u>

*Indicates figures in red.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R.
 Filed 5-4-43. Walter B. Maling, Clerk. By J. P.
 Welsh, Deputy Clerk.

(Testimony of Peter Bercut.)

Mr. Scampini: Q. What would you estimate the profit earned by this company for the first three months of 1943 was, about, if you know?

A. I don't know.

Q. Now I desire to point out to you, Mr. Bercut, that in arriving at the assets value of the plant and equipment of the company which was carried on the books in the balance sheet that ended on December 31, 1941, you carried plant property and equipment as follows—let us take 1940 first, December 31, 1940. Plant property and equipment, \$865,608.55; and on December 31, 1941, a year later, you still carried it at the same figure. Isn't it true that land down there is carried at cost on the books of the company?

A. I don't know.

Mr. Naus: Do you know that to be the fact?

Mr. Scampini: I am asking; I don't know.

Q. The land down there consists of approximately four square blocks on the Embarcadero, does it not? A. No.

Q. How much?

A. It is two blocks and part of another block. It was not that before we acquired it.

Q. You have acquired some property since?

A. Yes.

Q. It is the largest single piece of privately owned land in that district?

A. I don't know.

Q. It is all fed by spur tracks on the Embarcadero? [254]

A. Not all of it. We put in some more tracks.

(Testimony of Peter Bercut.)

Q. How many buildings are there there?

A. They go by numbers. We have there about three main buildings and other annexes.

Q. Smaller buildings?

A. Smaller buildings.

Q. Now, as of December 31, 1941 the buildings, machinery and equipment were valued—first, on December 31, 1940 they were valued at \$2,284,365.54, and as against which there had been reserved for depreciation the sum of \$1,336,625.18, bringing the net carried value of buildings, machinery and equipment to \$947,740.36. That is correct?

A. Yes, it must be correct.

Q. In 1941, a year later, the net carried value had been reduced after depreciation to \$891,869.89. That is right?

A. That is all bookkeeping. When you have the bookkeeper on the stand you can get that.

Q. But the reason I am asking this question is that every year there is a charge of about 70,000 to 75,000, and even up to 79,000, I think it is for 1942, charged as depreciation against the buildings, machinery and equipment.

A. I don't think that is enough. It depreciated much faster. Everything had to be repaired.

The Court: What is improper about that? What is the matter with that reduction?

Mr. Scampini: There is not anything. I am trying to find out how the net value was carried.

The Court: I want to follow the testimony.

(Testimony of Peter Bercut.)

Mr. Naus: I think, Mr. Scampini, that is the straight line method of depreciation on cost of many years ago.

Mr. Scampini: What I am driving at is the point that when it is carried at \$891,869.89, my opinion is that the reasonable value of these properties after writing off all depreciation [255] charges is not out of proportion to the carried value.

Mr. Naus: I thought you were asking for the fact.

Mr. Scampini: Q. In 1936 was there an appraisal of these properties made?

A. I don't know.

Q. In the reorganization proceeding?

A. I don't know.

Q. You have not come across it, have you?

A. My accountant did; I did not do it.

Q. Who is your accountant?

A. Mr. Evans.

Mr. Scampini: That will be all. Take the witness.

Cross Examination

Mr. Naus: Q. Mr. Bercut, I understood you to say that you fix approximately the time of your oral resignation to Mr. Arnold by reference to a loan of \$2,000 that you made to him?

A. Yes.

Q. Now, the purpose of that loan of \$2,000 was originally what?

A. Well, Mr. Arnold was worried by Mr. McInerney at that time.

(Testimony of Peter Bercut.)

Q. Mr. McInerney was pressing Mr. Arnold or the company for the payment of money?

A. For \$10,000.

Q. It was your suggestion, I believe you told Mr. Scampini, that you would be willing to be one of five men who loaned \$2,000 apiece and get rid of McInerney that way? A. Yes.

Q. After getting the \$2,000 from you did Mr. Arnold succeed in getting any money from anybody else to help him in that respect?

A. He told me that he had only been able to raise another \$3,000.

Q. Making \$5,000?

A. Making \$5,000. He did not succeed in getting the whole amount.

Q. So it was suggested that the \$2,000 arrangement be called off? A. Yes.

Q. Now, have you *with your* canceled check for the \$2,000 by which you can fix the date of the loan by you of that \$2,000? [256] Have you got that in your pocket? A. Yes.

Q. Will you produce it, please.

A. I have it here.

Mr. Naus: I only want this to fix the time, if your Honor please, not for anything else. Let me have the check.

I offer the check for the limited purpose I have stated, your Honor. The check is dated January 15, 1940, for \$2,000.

The Court: Very well; let it be admitted and marked.

(Check marked "Defendants' Exhibit A.")

(Testimony of Peter Bercut.)

DEFENDANTS' EXHIBIT A

11-1716

12

San Francisco, Cal., January 15, 1940

No.

The Anglo California National Bank
of San Francisco
Market-Ellis Branch—Market, Ellis
and Stockton Streets

Pay to the Order of California Pacific Service, *Ind.*
\$2,000.00 The Sum of \$2000 and 00 Cts.....Dollars
(Personal Account)

PETER BERCUT

(On reverse)

Pay to the Order of
Pacific National Bank
California Pacific Service, Inc.
39 Paid Through 39
Clearing House

or

Pay to the Order of
Any Bank, Banker or Trust Co.
Prior Endorsements Guaranteed

Jan 17, 1940

Pacific National Bank
of San Francisco

11-39

11-39

[Endorsed]: Defts. Ex. No. A. Filed 5-4-43.
Walter B. Maling, Clerk. By J. P. Welsh, Deputy
Clerk.

(Testimony of Peter Bercut.)

Mr. Naus: Q. I understood you to say to Mr. Scampini that Mr. Arnold paid that \$2,000 back in two installments of \$1,000 each. A. Yes.

Q. These other papers you have handed to me help you to fix the time of these payments back, do they? A. Yes, they do.

Mr. Naus: I might say, if your Honor please, that one is a bank statement showing a deposit of \$1,000, and the other is a deposit slip.

Q. By the way, Mr. Bercut, that \$2,000 you loaned Mr. Arnold did not come from any of your companies; it came from your personal funds, your personal bank account?

A. My personal bank account, yes.

Q. Now, I first hand you a monthly bank statement from the Anglo California Bank under the name of Peter Bercut. Was that your personal checking account? A. Yes.

Q. Can you tell from a deposit slip of \$1,000 in that account the month when it was that Mr. Arnold paid back to you the first \$1,000 on the loan of \$2,000? A. That would be December 1939.

Q. That is the beginning of the account. That is the old balance of December 31, and along here are dates through January. I notice here is a deposit of \$1,000 on January 31, 1940.

A. That is the check. [257]

Q. Is that the first \$1,000 he paid back to you?

A. The first payment on the \$2,000.

Mr. Naus: I will ask that that account be marked Defendants' Exhibit B for identification.

(The bank statement was marked "Defendants' Exhibit B for Identification.")

(Testimony of Peter Bercut.)

DEFENDANTS' EXHIBIT B

STATEMENT
In Account with
The Anglo California National Bank

PETER BERECUT,
743 Market St., San Francisco, Calif.

Checks		Date	Deposits	Date	New Balance	
Listed in Order of Payment—Read Across	Balance Brought Forward					
24.67—		Dec 30		39	2,382.24	*
22.76—		Jan 2		40	2,357.57	*
42.14—		Jan 4		40	2,334.81	*
25.00—		Jan 6		40	2,292.67	*
400.00—	9.61—	Jan 8	118.40	40	2,376.46	*
124.64—		Jan 9		40	1,976.46	*
		Jan 10		40	1,851.82	*
		Jan 11	85.00	40	1,936.82	*
		Jan 15	100.00	40	2,031.82	*
5.00—		Jan 17		40	31.82	*
2,000.00—		Jan 18		40	11.98—	0
43.60—		Jan 22	100.00	40	88.02	*
		Jan 29	100.00	40	188.02	*
		Jan 31	1,000.00†	40	1,188.02	*

†Circled and indicated in red pencil: "Pac. Empire deposit"

(Testimony of Peter Bercut.)

Important: Please Examine at Once. All errors or exceptions (including irregularities of endorsements, or of signatures) must be reported within 30 days, otherwise this bank will assume the above account to be correct.

In receiving items for deposit or collection, this bank acts only as depositor's collecting agent, and the rights and obligations of the parties are governed and controlled by the provisions of Sec. 16c of the Bank Act of the State of California.

We urge you to carefully protect your statements and cancelled checks as dishonest persons may steal them for fraudulent purposes.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R.
Defts. Ex. No. B for Identification. Filed.....
Walter B. Maling, Clerk.

Mr. Naus: Q. I hand you another slip, which is the carbon that you keep or your secretary made for you of a deposit that you made as of the date indicated; is that correct? A. Yes.

Q. State whether or not the \$1,000 appearing thereon as being deposited in your personal account was the second \$1,000 that Mr. Arnold paid back to you. A. Yes, 11/17/—

Q. Up in here, is that not the deposit made, May 6, 1940? A. Yes.

Mr. Naus: I will ask that this be marked for identification.

(The deposit slip was marked "Defendants' Exhibit C for Identification.")

(Testimony of Peter Bercut.)

DEFENDANTS' EXHIBIT C

THE CHATEAU

PETER BER CUT

May 6, 40

May 6, 40

11-39

1000

11-17-16

100

Pacific Empire Holdings

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No.
 22339R. Defts. Ex. No. C Ident. Filed
 Walter B. Maling, Clerk.

Mr. Naus: Q. So, was it on May 6, 1940, that you deposited Mr. Arnold's check for the second \$1,000 that he paid back to you? A. Yes.

Q. I understood you to say to Mr. Scampini this morning that on the second \$1,000 Mr. Arnold gave you what you called a postponed check; you mean a postdated check? A. Yes, postdated.

Q. Now, this postponed or postdated check that you deposited on May 6, 1940, you deposited it as soon as the date came that was written on the check, didn't you?

A. Yes, I was expected to hold it until that date.

Q. About how long in the future was the check dated or postdated when Mr. Arnold gave it to you?

A. Oh, I think about [258] two weeks.

Q. It was postdated about two weeks?

A. Yes.

(Testimony of Peter Bercut.)

Q. Well, then, is it not the fact that he actually handed you this check approximately two weeks before May 6, 1940, the date you deposited it?

A. Yes.

Q. Do you fix the time of your statement or oral resignation to Mr. Arnold as the time when he finally gave you the postdated check?

A. Yes, because I had quite some trouble getting it from him.

Q. Tell the Court something about the difficulty you had in getting that second check from Mr. Arnold, after he had given you the first check.

A. I had to go several times, and most of the time they would tell me Arnold was not there, and finally I saw him, I caught him there, and he had to give me the check.

Q. He gave you the postdated check?

A. He told me it had to be postdated.

Q. That would be roughly two weeks before May 6, 1940, when he finally gave you a postdated check that you told him that you were through with these two companies? A. Yes.

Q. Now, in one of the exhibits put in by Mr. Scampini for the plaintiff there is a reference to the resignation being backdated to March 31, 1940. In putting that back date on your resignation was that date selected by you or was it selected by Mr. Arnold?

A. It was selected by Arnold. I did not even know what date it was when he gave it to me.

(Testimony of Peter Bercut.)

Q. Have you any idea why Mr. Arnold selected the date of March 31, 1940, any more than he might have selected any other date?

A. The only thing I can think of, he had to get close to the date that I resigned. [258-A]

Q. In connection with this matter of the physical condition of the buildings, when you took the management over, describe to the Court the physical condition of the property itself, the ammonia process and refrigerating equipment. Had it been kept up?

A. It had been running down for years. It would be a very difficult thing to describe. It was practically all run down—the insulation falling down from all the pipes.

Q. The insulation fell away from the pipes?

A. Yes, and we have not had the time to fix it all up yet. There is plenty to do. And the ceilings of the refrigerator rooms leaked and got wet and fell down.

Q. If the Judge cares to, you could take him down and show him the condition yet?

A. I would be very happy to do that. We have been straightening up the roof for six months, fixing the roof, because every place is covered with leaks and the water running into the merchandise.

Q. Now, in the year 1941 you had had the management of the company for about ten months; that is, after the first two months of the year you ran it the last ten months? A. Yes.

(Testimony of Peter Bercut.)

Q. According to this profit and loss statement you made a net operating profit of about \$4,000 for that year. A. Yes.

Q. During that year did you or your brother, or both of you, give personal guarantees to the bank up to \$100,000 on the finances? A. Yes.

Q. And by giving your personal guarantee did you get the interest rate cut down at the bank?

A. They were paying eight per cent, and when I called that to the attention of the bank, that eight per cent on the loan, they said that their credit was bad, and I said, "If I guarantee the notes, will that make a difference?" and they said it would be four per cent, and in order to get the [259] four per cent I guaranteed the notes.

Q. Take the year 1942, the statement here shows that in that year there was an operating profit for the year of \$156,401.98. By the way, that was before the Federal taxes, was it not—that was before the payment of Federal corporation income taxes?

A. Yes, before the Federal.

Q. After the payment of the Federal corporation income taxes on that \$156,000 did you not take what was left and use it in order to pay and retire amounts of the principal on the bond issue, or else put it back into the buildings in an effort to rebuild the property? A. That was it.

Q. Since you have taken over the management have either you or your brother taken out a penny by way of salary or compensation or dividends or profit of any kind?

(Testimony of Peter Bercut.)

A. No, I didn't think that they could afford it.

Q. And you always put it back and still are trying to rebuild the property? A. Yes.

Q. And is there still a good deal of that to be done to put it in proper shape?

A. I am spending all of my time working on it.

Redirect Examination

Mr. Scampini: Q. These notes that you guaranteed at the bank, which bank was it?

A. The Pacific National Bank.

Q. Where you are a director? A. Yes.

Q. You became a director of that bank through Pacific Empire Holdings and the Pacific Empire Corporation, didn't you? A. Yes.

Q. You never suffered any loss or incurred any damage as a result of your guaranteeing the notes for the Merchants Ice & Cold Storage Company, did you? A. No. [260]

Q. The company paid for its own obligations without any damage to you or any reason for you to make good on your guarantee, didn't it?

A. I just thought it was for the benefit of the company to do that.

Q. And of course, you felt it was for the benefit of yourself as the owner of more than half of the outstanding stock, didn't you?

A. Oh, yes, I figured for myself, too.

Q. You didn't think of guaranteeing the notes of the company or improving its credit prior to your acquisition of the block of stock; you thought of it after that?

(Testimony of Peter Bercut.)

A. But I never did it any damage either.

Q. I will ask you again, You never offered to guarantee the note of the Holding Company prior to your acquisition of this block of stock?

A. I was not asked to do that.

The Court: I might say there was no obligation for him to do so.

Mr. Scampini: I grant your Honor is correct, except to say the acquiring of the stock is not a benefit to the company, it is a personal benefit.

The Court: He answered it by saying he has something to work for.

Mr. Naus: He has some control of it.

Mr. Scampini: Q. In 1941 you reported a profit of \$4,495, but you had a lot of expenses for repairs and damage that you found in the plant, didn't you?

A. Yes.

Q. You charged all of those expenses to depreciation?

A. The expense of repairs was very heavy and the expenses are all accounted for.

Q. Who owns or who has possession of this block of stock acquired from the Pacific Empire Holdings from Mr. Maffei and [261] Mr. Arnold?

A. Henri Bercut and Peter Bercut.

Q. Henri Bercut and Peter Bercut?

A. Yes.

Q. What proportion of the stock does Henri Bercut own? A. Half.

(Testimony of Peter Bercut.)

Q. You negotiated the deal with Mr. Arnold and Henri was a partner with you, is that right?

A. Yes, my brother and I have been in partnership in other ventures.

Q. He had nothing to do with negotiating the deal?

A. In fact, he didn't want any part of it at first, and I had to do a lot of talking to get him interested with me.

Q. You conducted the negotiations yourself with Mr. Arnold? A. Yes.

Q. You signed the contract yourself with Mr. Arnold, Henri Bercut never signed? A. No.

Q. Did your other brother or sister have any interest in the stock? A. No.

Q. Just you and your brother Henri?

A. Yes.

Mr. Scampini: At this time I move to dismiss as to the defendant Jean Bercut—that is your sister?

The Witness: No, that is Jean (pronouncing "John").

Mr. Scampini: Q. Your brother?

A. Yes.

Mr. Scampini: Ernest Bercut, Mary Doe Bercut, May Jane Bercut.

Q. Ernest Bercut—is he your brother?

A. He is my nephew.

Q. He has no interest in this stock?

A. No.

(Testimony of Peter Bercut.)

Q. Just you and your brother Henri?

A. Yes.

Q. Where are the shares now?

A. In our possession.

Q. In your possession? A. Yes.

Mr. Naus: The defendants you have dismissed are Jean Bercut, Ernest E. Bercut, Mary Doe Bercut, and Mary Jane Bercut. There still remains the case against the fictitious defendants. [262]

Mr. Scampini: I have already dismissed against the fictitious defendants.

Mr. Naus: So there remain only Henri Bercut and Peter Bercut and Maffei and Arnold?

Mr. Scampini: That is right. That will be all.

Mr. Pardini: Along the line of examination that was opened up, just a question:

Q. Have you any arrangement or agreement whereby L. R. Arnold or M. Maffei have any interest in any of these shares of stock?

A. No.

Q. Have they any right, title or interest in any part of the shares of stock which are in issue?

A. No.

Q. Have they ever had after January 8, 1940, any interest in connection with the corporation other than before they were out there as officers?

A. No, they never came back to the plant or anything.

Q. And they had no interest in the shares of stock other than that small block of stock that you said you purchased from Mr. Maffei?

(Testimony of Peter Bercut.)

A. No. The option to buy the 20,000 shares was to the company.

Q. You had no arrangement with Mr. Maffei or there has never been one in existence; is that right?

A. That is right.

Q. Mr. Arnold and Mr. Maffei have no interest in the shares of stock which you have testified are now in the name of yourself and your brother Henri?

A. No.

Mr. Pardini: That is all.

Mr. Naus: Q. Mr. Bercut, as a matter of fact, in buying this stock, the stock you and your brother Henri bought, you bought strictly on your own account, and you had no arrangement with Mr. Arnold and Mr. Maffei, and you have no such [263] arrangement now in the world; is that correct?

A. That is correct.

Q. As a matter of fact, immediately after buying the stock you fired Mr. Arnold so far as any connection with the company is concerned? You did not want to have him have anything to do with it?

A. No.

Q. Mr. Maffei had nothing to do with the management since the time you went in?

A. No.

Q. You fired Mr. Morris because you thought \$250 a month was \$250 a month more than he was worth to the company, because he was not doing anything?

A. Yes, and the company could not afford it either.

(Testimony of Peter Bercut.)

Mr. Scampini: Q. I forgot to ask you: On or about September 9, 1942, did you receive the original of this letter from me asking for return of stock? A. Yes.

Q. You will admit, of course, that that was never returned or offered to be returned, is that right?

A. Yes.

Mr. Scampini: I offer in evidence a demand and ask that it be marked plaintiff's exhibit next in order.

Mr. Naus: Just to prove the demand, not to prove the fact.

(The letter was marked "Plaintiff's Exhibit 34.")

PLAINTIFF'S EXHIBIT 34

HETTMAN & SCAMPINI

Counselors at Law

Bank of America Bldg.

485 California St.

San Francisco

A. J. Scampini

Walter E. Hettman

September 9, 1942

Mr. Peter Bercut,

Merchants Ice & Cold Storage Co.,

Battery & Lombard Sts.,

San Francisco, California.

Dear Sir:

Please be advised that Thomas H. Wingate, by an order of the Chancery Court of the State of

(Testimony of Peter Bercut.)

Delaware, County of Newcastle, in which county Pacific Empire Holdings, Incorporated, was and is incorporated, has been appointed receiver in equity for Pacific Empire Holdings, Incorporated, with full power and authority to take possession of all of its business affairs, books, records and properties and vested with title to all of the property, real and personal wheresoever situated and of whatever kind or character, other than real estate located outside of the State of Delaware.

Reference is hereby made to that Letter Agreement dated January 8, 1941, purportedly entered into between yourself, in an individual capacity, and Pacific Empire Holdings, Incorporated, of which you were then and there director, vice president and a member of the executive committee, wherein and whereby you purportedly purchased 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company from Pacific Empire Holdings, Incorporated, for the alleged consideration of \$35,000.

You are hereby advised that said Thomas H. Wingate as such receiver hereby repudiates the said transaction and demand is hereby made upon you and all those acting through you in the premises to deliver possession of said shares of stock forthwith to A. J. Scampini, Esq., who has been designated agent and attorney in California for said receiver, in failure of which proper proceedings will be

(Testimony of Peter Bercut.)

brought against you and all persons acting with and through you in said transaction.

Yours very truly,

A. J. SCAMPINI

Attorney for Thomas H. Wingate,
Receiver in Equity for Pacific
Empire Holdings, Incorporated.

AJS:hw

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Plfs. Ex. No. 34. Filed 5-4-43. Walter B. Maling, Clerk. By J. P. Welsh.

Mr. Scampini: Mr. Brownstone made the statement to the Court in his opening statement that no tender was made of \$35,000, and I ask Mr. Brownstone to stipulate that on or about March 24, 1943, he received the original of this letter from me, and ask him to stipulate that he never replied.

The Court: We will take a short recess and counsel may examine the document.

(After recess:)

Mr. Brownstone: Since we are going to discuss the letters [264] which have passed between counsel before trial, I will make this answer to your question: On March 23, 1943, I had a conversation with you with respect to the matter of time for filing claims against the receiver as the representative of the Merchants Ice & Cold Storage Company, and

(Testimony of Peter Bercut.)

at that time you suggested the possibility of settlement of the case to me and said that you would be willing to pay \$35,000 and more, and that you had the cash on hand.

On March 24, 1943, you forwarded me a letter, a copy of which I show you, in which you made a number of statements to which I did not reply in writing, but a few days subsequent to March 24,—and I can check the date from my notes—we had a further conversation in which I advised you that the statements that you made in the letter were not true, and you further made the statement with respect to the tender that you had \$35,000 in the bank downstairs, and at the opening of the trial you would tender \$35,000 to us in open court. With that statement, and with the statement, your Honor, that these letters are entirely immaterial, we are perfectly willing to let your Honor read them.

Mr. Pardini: As to this matter, I will say, representing Mr. Arnold and Mr. Maffei, that no foundation has been laid for the introduction of such evidence; it is immaterial, irrelevant and incompetent and hearsay, and I will reserve a motion to strike out the testimony at the proper time.

The Court: The record may so show.

Mr. Scampini: I will ask that the letter be received in evidence, then, for whatever it may be worth.

(The letter was marked "Plaintiff's Exhibit 35.")

(Testimony of Peter Bercut.)

PLAINTIFF'S EXHIBIT No. 35

March 24, 1943.

Mr. Louis H. Brownstone,
Attorney at Law,
Russ Building,
San Francisco, Cal.

Dear Mr. Brownstone:

Re: Wingate vs. Bercut

This will confirm our understanding with respect to the above matter as expressed in your letter to me of March 23, 1943.

I told you over the 'phone yesterday that up to the present time I have pursued a policy, in connection with the litigation pending against the Bercuts, of hiding from you none of the facts upon which we rely in support of our claim. I have no doubt you will admit that we have made available to you every scrap of evidence that we possess. The reason I have done this is so there can possibly be no dispute about the facts of the case.

It is true that Mr. Bercut takes the position that he ceased being a director of the holding company sometime in 1940, but between us as two lawyers I have no doubt at all that the contention is not made very seriously—the facts are against said contention.

The situation therefore resolves itself into purely a legal proposition, and when it comes to that phase

(Testimony of Peter Bercut.)

of the case the law is in the books, and I told you that I would submit to you the authorities upon which I intend to rely in support of our claim. Consequently, herewith is a memorandum in both cases. I think, after you have studied over the theory of our case and the authorities cited in this memorandum you will come around to seeing our point of view—namely: that Mr. Bercut should return that stock to the company from whence it came. I assure you that the Receiver, subject to the approval of the court, is ready and willing to make such adjustments toward Mr. Bercut as might be reasonable in view of the circumstances.

In view of the fact that I have now delivered to you even the law upon which I intend to rely I think, if you decide to go to trial, you should serve upon me the authorities upon which you intend to rely so that we may be prepared in open court to argue each others case.

Kind personal regards.

Yours very truly,

A. J. SCAMPINI

AJS:hw

(Testimony of Peter Bercut.)

March 23, 1943

Mr. A. J. Scampini,
Attorney at Law,
300 Montgomery Street,
San Francisco, California.

In re: Tanzer v. Pacific Empire Holdings, Inc.—
Court of Chancery—State of Delaware, in
and for New Castle County

Dear Mr. Scampini:

Confirming our conversation of today respecting the filing of claims by creditors in the above named receivership proceeding, you have advised me that the time within which claims may be filed in the receivership proceeding has not as yet begun to run. You have further advised me that arrangements are being made so that the claims of California creditors may be filed locally and that creditors will be given notice of the time within which, and the place at which to file such claims.

It is further our understanding that you will advise me of such time and place when the same has been fixed, so that I may take such action as I deem necessary and proper to protect the rights of California claimants represented by me.

Very truly yours,

LOUIS H. BROWNSTONE

LHB/NP

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Plfs. Ex. No. 35. Filed 5-4-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy.

(Testimony of Peter Bercut.)

Mr. Scampini: There is that Exhibit 26, which is a [265] letter of resignation by Mr. Bercut, which was only offered for the purpose of identification so far, and I will ask that it be now introduced in evidence as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Plaintiff's Exhibit 26 for Identification was received in evidence.)

PLAINTIFF'S EXHIBIT No. 26

March 31, 1940

Pacific Empire Holdings, Inc.
26 O'Farrell Street
San Francisco, California

Gentlemen:

Because of the pressure of other business, I will be unable to devote sufficient time to the company to be of real value.

Consequently, please consider this letter my resignation as an Officer and Director of Pacific Empire Holdings, Inc.

Yours very truly,

PETER BER CUT

PB/lk

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R.
Pltfs Ex. No. 26. Filed 5-4-43. Walter B. Maling,
Clerk. By J. P. Welsh, Deputy Clerk.

(Testimony of Peter Bercut.)

Mr. Naus: Just one question, Mr. Bercut:

Q. Mr. Scampini showed you what the clerk has marked Plaintiff's Exhibit 34, a letter from Mr. Scampini addressed to you as of September 9, 1942. Up to the time that letter was received by you, about twenty months after the deal, had anyone ever said to you either orally or in writing that there was anything wrong with the deal?

A. No, not a word.

Q. During the entire period of twenty months, then, from the time the deal was made until Mr. Scampini wrote you that letter, you had no intimation either orally or in writing that there was anything wrong with the deal?

A. No, not a word.

Q. You paid \$35,000 at the time of the deal?

A. Yes.

Q. And at the time of the deal you did not get all of the stock, all of the stock that was coming to you, did you?

A. No.

Q. There was some 5,000 or 5,500 that you got a little later?

A. Yes.

Q. And there was delay in the delivery of them because somebody was holding them in pledge?

A. Yes.

Q. Didn't you and your brother have to pay \$3,950 to get that stock out of pledge?

A. My brother loaned the money to get the stock out of pledge; I did not do it.

Q. Some two or three months after January 8, 1941 your brother turned over \$3,950 to Mr. Arnold

(Testimony of Peter Bercut.)

or to Pacific Empire Holdings [266] by way of a loan? A. Yes.

Q. In order that Pacific Empire Holdings—sometime, I think it was, in April '41, wasn't it?

A. Yes.

Q. So that sometime in April 1941 Pacific Empire Holdings could redeem some of the shares and deliver them to you? A. Yes.

Q. Has that \$3,950 ever been paid back to you?

A. Only one payment on the note, which I think was \$100 a month.

Q. \$100 was paid?

A. They only paid \$100.

Q. Now, that took place, did it not, some two or three months after you actually signed and handed over to Mr. Arnold the paper of resignation as a director? A. Yes.

The Court: Step down.

Mr. Scampini: I now ask permission to read into the record the deposition of Miss Leona Keener that has been taken, your Honor.

(Thereupon the deposition of Leona Keener was read.)*

Mr. Scampini: I wish now to read the deposition of L. R. Arnold.

(Thereupon counsel read the deposition of L. R. Arnold to line 3, page 32.)

The Court: We will take an adjournment now until tomorrow morning at ten o'clock.

(Thereupon an adjournment was taken until Wednesday, May 5, 1943, at 10:00 a. m.) [267]

*[Printer's Note]: Set forth herein at page 675.

Wednesday, May 5, 1943—10:00 A. M.

Mr. Scampini: We will continue with the reading of the deposition of Mr. Arnold.

(Thereupon counsel continued with the reading of the deposition to line 18, page 152.)

The Court: We will take a recess now until two o'clock.

(Thereupon a recess was taken until 2:00 p. m. this date.)

Afternoon Session—2:00 P. M.

Mr. Scampini: If your Honor please, counsel asked me this morning to produce these documents or correspondence or what not that transpired between Delaware counsel and what not, and I don't know whether counsel wanted them in evidence.

The Court: Let them inspect it, and let us proceed.

Mr. Scampini: Might I have permission of the Court to call out of order one of our expert witnesses, Mr. Haynes, who happens to be here at two o'clock?

The Court: Very well.

A. W. HAYNES

called for plaintiff; sworn.

Direct Examination

Mr. Scampini: Q. Mr. Haynes, you are a member of the firm of Haskins & Sells? A. Yes.

Q. And Haskins & Sells are certified public accountants? A. Yes.

Q. You are a partner in that firm?

A. Yes.

Q. You, of course, are a certified public accountant also? [270] A. I am.

Q. How long have you been practicing your profession? A. Twenty years.

Mr. Scampini: Will you stipulate to his qualifications?

Mr. Naus: I don't know anything about the gentleman. I assume he is qualified and has had experience.

Mr. Scampini: Q. Haskins & Sells were for some years auditors of Merchants Ice & Cold Storage Company? A. Some years.

Q. What years, do you recall?

A. I recall only the years 1936, 1937 and 1938.

Q. And terminated as auditors as far as that firm was concerned with the year ending December 31, 1938, is that right? A. That is right.

Q. Do you know whether or not John F. Forbes succeeded you as auditors down there for the following year?

A. He did the following year; beyond that I have no knowledge.

(Testimony of A. W. Haynes.)

Q. Have you got with you the audit and work papers upon which the audit was made of Merchants Ice & Cold Storage Company for the year up to and ending December 31, 1938?

A. I have the audit report and certain of the work papers with me.

Q. Have you also got the audit report for 1937?

A. Yes.

Q. Now, looking at your audit report, Mr. Haynes, will you state to the Court the aggregate assets of the company for the year ending December 31, 1938.

A. The aggregate assets—

Mr. Naus: One moment. That is calling for an answer as to facts, and probably much of his information is based on hearsay from the books and what was told him.

Mr. Scampini: Q. As shown by the books of the company which you audited.

A. The total assets as shown by the [271] books and as set forth in our report amounted to \$2,153,809.33.

Q. How much was the aggregate current and fixed liabilities and other charges other than equity behind the stock for the year ending December 31, 1938?

A. Total liabilities other than capital stock and surplus account amounted to \$882,894.63.

Q. How much was the net worth of the company for the year ending December 31, 1938?

A. The net worth on that basis was \$1,270,914.70.

(Testimony of A. W. Haynes.)

Q. The net worth of the company was represented by how many shares and of what class, Mr. Haynes?

A. As of December 31, 1938 there were outstanding 41,615 shares of preferred stock and 107,-180 shares of common stock.

Q. And the par value of the preferred stock was how much?

A. The par value of the preferred stock was \$10 a share.

Q. Can you state whether or not that preferred stock carried—what dividend rate it carried and whether or not it was cumulative?

A. The preferred stock carried a cumulative seven per cent rate.

Q. How much had the firm accumulated as cumulative dividends on preferred stock up to December 31, 1938, approximately? A. \$340,000.

Q. Now, the net worth of the company evidenced by the preferred stock and common stock, what value did you give the outstanding preferred stock?

A. The figure before mentioned as net worth of the company, as expressed at \$1,270,000-odd would be reduced by the \$340,000, and applying that to the preferred stock would arrive at the common equity.

Q. In other words, in arriving at the amount of net worth attributable to the outstanding preferred stock you would have [272] to attribute to it not

(Testimony of A. W. Haynes.)

only its par value but also the cumulative dividends unpaid; is that right? A. Yes.

Q. How much would that be per share, that is, par value plus cumulative dividends?

A. Approximately \$18.17 per share.

Q. Per share on outstanding preferred stock, is that right? A. Yes.

Q. And the net worth of the company was sufficient to attribute or to allocate—what would probably be a better term—the sum of \$18.17 to outstanding preferred stock and some equity in common stock? A. Yes.

Q. How much would the equity be which would be allocated to common stock?

A. That would leave for that common stock \$514,764.70.

Q. How much would that be per share?

A. \$4.80.

Q. Now, in arriving at the net worth of the company upon what were the values of land, buildings and equipment arrived at, that is, what was the formula used?

A. The value of the land and what we generally term the fixed assets was based on an appraisal made by the American Appraisal Company in 1927. To that had been added subsequent additions and there had been deducted retirements up to December 31, 1938.

Q. That is the land?

A. That includes the land, buildings, machinery, equipment, fixtures, and other terms of property.

(Testimony of A. W. Haynes.)

Q. Now, what formula was used in determining the depreciation on all of these buildings and equipment?

A. At the time the American Appraisal Company made its appraisal in 1927 it recognized what is termed a composite rate of $3\frac{1}{4}$ per cent, and the company followed that rate of depreciation throughout the period with which I am familiar at least.

Q. Let us take 1938. Was the amount of depreciation [273] allocated the concern for that year based upon that formula?

A. For 1938 the provision for depreciation amounted to \$73,614.24.

Q. In 1937 how much was the provision for depreciation?

A. It was something less—\$600 or \$700 less. I can give you the exact figures for 1937; the provision for depreciation was \$72,486.71.

Q. Now, in arriving at the net worth of the company as of December 31, 1938 how much depreciation had been taken on the buildings, machinery and equipment up to that time?

A. In the aggregate the reserve for depreciation as of December 31, 1938 amounted to \$1,185,957.71.

Q. Leaving a net value, in other words, for buildings, machinery and equipment on December 31, 1938 of what figure?

A. Exclusive of land?

Q. Exclusive of land. A. \$1,083,094.70.

Q. Now, the land was carried at what figure?

(Testimony of A. W. Haynes.)

A. \$890,608.55.

Q. And that value is the appraised value of the property or land made by the American Appraisal Company in 1927; is that right, plus any additional cost, less any retirements?

A. At either cost or appraised value of the property.

Q. What is the par value of the common stock outstanding?

A. The common stock is stock without par value and carried at a stated value.

Q. What is the stated value?

A. \$999,575.

Q. Did the company have a deficit in its surplus account on December 31, 1938?

A. Its operating surplus?

Q. I do not know anything about accounting.

A. The composition of the surplus account was a net deficit. It consisted of various items. There was a surplus from depreciation of the land value of \$148,700-odd. [274]

The Court: Q. What do you mean by that?

A. The American Appraisal Company placed a value on the land at the time of \$148,000 in excess of what it cost the company. It wrote this land up to that appraised value. There was also surplus which arose from acquisition of preferred capital stock at less than par value of some \$79,000 and subsequent acquisition of common stock at less than the stated value of approximately \$4,500. These

(Testimony of A. W. Haynes.)

amounts total slightly less than \$233,000 and there is offset against the profit and loss deficit from operations \$377,000-odd, leaving a net deficit or impairment of capital of \$144,800-odd.

Q. What was the value of the common stock that they bought?

A. They paid something like \$4,000 less for the common stock than the stated value per share.

Mr. Scampini: Q. Now, in arriving at the net worth, I take it that that deficit had already been deducted; is that right?

A. Well, yes, that had been deducted.

Q. In the course of your audit of the company's affairs for the year 1938 did you verify the current assets and accounts receivable and other items constituting the current assets? A. Yes.

Q. Were proper reserves set up by you, or reserves deemed by you proper, between the accounts doubtful or uncollectible accounts receivable?

A. They were deemed to be adequate.

Q. The net worth figures to which you testified are the result after the allocation of proper reserves against those doubtful or other uncollectible items, is that correct? A. Yes.

Mr. Scampini: That is all.

Cross Examination

Mr. Naus: Q. Mr. Haynes, Haskins & Sells did the annual [275] auditing for what years?

A. 1936, 1937 and 1938 that I know of, and some years behind probably, but I could not state.

(Testimony of A. W. Haynes.)

Q. You mean earlier than that? A. Yes.

Q. You know as to those three calendar years 1936, 1937 and 1938 because you have the papers before you? A. I have the reports before me.

Q. You have the reports and some work sheets as well? A. Some work sheets on 1938 only.

Q. You have no information immediately at hand with respect to any earlier years? A. No.

Q. Is that clear? A. That is clear.

Q. Now, this audit was not merely addressed to the balance but to the operations of each of those three years, was it not? A. Yes.

Q. You audited the net result of the operations of the Merchants Ice & Cold Storage Company for each of those three years? A. Right.

Q. Is it the fact that the net result of the operation of the company for each of these years was a loss in each of those three years?

A. There was a loss in each of the three years.

Q. Did you or not from your audit determine that for the calendar year 1936 the operations of the company for that year resulted in a loss of \$75,112.69? A. I have got \$75,114.69.

Q. I probably read the figure 4 as 2. We are within \$2 of each other. A. Yes.

Q. The loss was something over \$75,000 in operations for that year? A. Yes.

Q. Now, in the year 1937 did you find from your audit that the——

A. I take exception to the statement you made

(Testimony of A. W. Haynes.)

that the loss from operations was \$75,000. We make a distinction [276] between unusual charges and ordinary operating charges. \$75,000 was the net deficit in the deficit account for the year, but there was something over \$8,000 of extraordinary charges, the major portion of which applied to prior years.

Q. I will put it to you this way, the simplest possible way: What did the Merchants Ice & Cold Storage Company lose in the calendar year 1936 by virtue of running the business?

A. 1936 we would say the net loss from operations was something slightly over \$67,000.

Q. Now, in the year 1937 was there a net loss of something over \$8,000?

A. Slightly over \$8,000.

Q. And for the calendar year 1938 did the Merchants Ice & Cold Storage Company run at a loss of over \$128,000?

A. We would say the loss for the year was something over \$51,000 and there were \$70,000 of unusual charges which would apply to the earlier years.

Q. What were they?

A. From what I have here I can make no allocation as to appropriate years. There were liabilities of \$26,000 of uncollectible accounts applicable to prior years and a write-down of the investment in Acme Ice Cream Company for \$35,800, approximately, and a provision for contingencies of \$15,000,

(Testimony of A. W. Haynes.)

which I do happen to know was directed mainly to the account of the Globe Brewing Company.

Q. Well, disregarding these items that you say were the non-operating items, is it or not a fair rough general statement from me that for the three years that your audit embraced, that for that three years the Merchants Ice & Cold Storage Company lost in excess of \$100,000 or virtually that for running the business? A. I should say yes.

Q. It lost close to \$125,000 in running the business, didn't it, [277] in the aggregate in those three years? A. Close to \$125,000.

Q. Now, on this net worth that you spoke of, you gave a figure of \$2,100,000, or, rather, the total amount of the assets.

A. That was the total amount of assets.

Q. Did you include in your statement of those assets the paper value of \$25,000 as an asset which in fact had been spent in order to obtain relief from this court under Section 77b?

A. Are you referring to the reorganization?

Q. I don't know whether you call it reorganization; I am referring to the matter of getting a five-year extension of the time and the amortized payment of principal under the bond issue.

A. Can you direct your finger at the \$25,000 in the report?

Q. I will ask you to direct yours. It was during the three years that you were speaking of that what you call the reorganization occurred, wasn't it?

(Testimony of A. W. Haynes.)

A. I believe it was 1936, was it not?

Q. Well, isn't that within the three years? I think it was in 1936 or 1937. From your audit what did you find that that five-year extension of the time cost the company by way of paying out money?

A. I could not give you the amount without reference to the detailed work papers, for this was included in the amount of \$36,900 under the caption of Unamortized Reorganization Expense and Bond Discount Expense.

Q. As of December 31, 1938 did you include in that statement of yours an item of \$36,927.04?

A. Yes.

Q. What was that item? Do you know what it was made up of?

A. In early years the company had a bond issue. These corporations have certain expenses in connection with floating a bond issue. This company also sold the bonds at something less than par. It is common practice among corporations to defer the [278] amount of such payment over the life of the issue itself. As to the detailed charge of that, I would have to have the detailed working papers.

Q. Your final answer is you don't know what makes up that final item of \$36,900?

A. I have not made any inquiry.

Q. What would make it up?

A. I could not tell you the precise nature of the item expense other than the items I told you of.

Q. Can you tell whether or not during the three years of your audit which embraced the period of

(Testimony of A. W. Haynes.)

the five-year extension, can you tell us anything, tell the Judge anything with respect to whether or not the company paid out around \$25,000 in order to get that five-year extension?

A. I don't know what the amount was, but it certainly spent some money, otherwise you would not have the caption in here "Reorganization Expense" which is written off over the life of the bonds, which is again common practice.

Q. Let me put it to you this way: Assuming that the amount was \$25,000, I think that is correct, and we paid out for attorneys and for printing, and for one thing and another, in order to get that five-year extension out here in court, that is money that is paid out really as an expense to get that extension. Now, you would take that \$25,000 and instead of charging it off in that year as expense you would put it on the asset side of the firm assets, wouldn't you?

A. Yes.

Q. So, for all you know, that \$36,000-odd, that includes \$25,000 of money that had been paid out for expenses, and after getting through your audit you carry it as an asset and include it in what you call the net worth; is that right?

A. Yes.

Q. Now, as a matter of fact, that is nothing but a bookkeeping [279] transaction for the simple purpose of distributing that expense over a period of years?

A. That is true.

Q. But after you close the audit and look around for the assets, there is \$25,000 that you would not find there at all; isn't that right?

(Testimony of A. W. Haynes.)

A. That is right.

Q. Now, this appraisalment that you spoke of was back in 1927? A. Yes.

Q. Do you know whether that was a fire insurance appraisal? A. No, I do not.

Q. You don't know one way or the other?

A. No.

Q. Fire insurance appraisals, by reason of the nature of the way that fire insurance company business is conducted, are appraisals based on the cost of reproduction less depreciation, isn't that right?

A. A fire insurance appraisal is based on what they call insurable value.

Q. It in turn is based on reproduction less depreciation, isn't it?

A. It is based on sound value at reproduction cost less depreciation.

Q. I am speaking in terms of the insurance policy under which they agree to pay you if your building burns down, what it would cost to reproduce that entire building less depreciation. You understand that, don't you? A. Yes.

Q. And that takes no regard whatever of obsolescence, does it?

A. I could not say that; I am not an appraiser.

Q. So you do not purport as you sit there as one of the members of Haskins & Sells to vouch for that appraisal one way or the other with respect to whether these buildings were worth that?

A. No.

(Testimony of A. W. Haynes.)

Q. You do not purport, do you, to say that whatever buildings were there, they were being kept up in a proper state of [280] repair? You did not go into that, did you?

A. Do you mean to infer that we don't inquire into it?

Q. No, I am asking you whether you went out and visited the buildings to see if they were being kept up properly and being kept in repair.

A. We always make some inspection of the buildings. We do not go to all of them.

Q. Tell me this: In the three years that you speak of did Haskins & Sells make any physical examination of the buildings to see if they were being kept up in good repair, or whether the repairs were being let run behind? A. I could not say.

Q. Now, you know, don't you, that in looking over the books you found that the company had written in the books what are known as the write-up of assets? A. Yes.

Q. And that write-up of the assets in connection with the land was put in \$148,000 more than the books showed its cost or value? A. Yes.

Q. You do not purport to tell the Judge anything as to what the books show with respect to the land, do you? You did nothing to see that the land is or is not worth so much?

A. That is true.

Q. So, as far as you are concerned, you are taking somebody else's figures from the books as to

(Testimony of A. W. Haynes.)

what the books show on the land, and you assume the correctness of that for your audit?

A. I think that is an unfair inference.

Q. I am asking the question; I am simply putting the question.

A. We feel that we have a right to rely on the findings of an expert in certain matters; we are not appraisers of buildings and land and property.

Q. Then your audit report and your statement of net worth comes down to this, doesn't it, that finding on the books someone [281] else has put such and such a value down there, you assume the correctness of that and proceed accordingly?

A. You can put it that way.

Q. I am putting it that way. What is the answer? A. Yes—the answer is yes, twice.

Q. Now taking December 31, 1938, state to the Court on one side what you reported as the current assets of the corporation and on the other side what you reported as the current liabilities.

A. The current assets were stated in the report to be \$67,672.41 and the current liabilities were stated to be \$186,856.61.

Q. The current liabilities, then, according to the audit, were roughly about three times the current assets as of December 31, 1938? A. Yes.

Q. That is a pretty sick condition for a company, isn't it? A. It is not healthy.

Q. Well, I will go further: It is a pretty sick condition, isn't it?

(Testimony of A. W. Haynes.)

A. I think we say the same thing.

Q. I will assume both statements are right. Now, as a matter of fact, your audit shows as of December 31, 1938, that the company had nowhere near enough cash on hand even to pay taxes, isn't that correct?

A. I will have to see the report for that. I recall, however, about \$6,000 cash.

Q. About \$25,000 in taxes, was it not?

A. \$25,000 in taxes.

Q. Now, as a matter of fact, with current assets only of about one-third the current liabilities—that all depends on whether the receivables shown under the assets work out all right, doesn't it?

A. Yes.

Q. That was merely a guess as to whether they would or not; that is all it amounts to, is it?

A. Yes.

Q. But so far as the current liabilities are concerned, they [282] knew there was no way of reducing them. They owed \$186,000 and they might or might not have so much as \$6,000 or \$7,000 on hand to meet them; isn't that correct?

A. That is true.

Q. You don't know whether the company made or lost money before 1936, do you?

A. I could not say.

Q. You don't know whether the company did or didn't make money after 1938, do you?

A. No, I have no knowledge after 1938. Going

(Testimony of A. W. Haynes.)

back to the preceding question, I would say that I don't know whether it lost money prior to 1936. They had, however, an accumulated deficit at the beginning of 1936 of \$165,000, so it would seem fair to assume that they lost some money prior to that.

Q. Especially year after year, if you look into it. That is all.

The Court: Q. You mentioned the American Appraisal Company. What is that?

A. The American Appraisal Company is the leading company of its type in the country. It has its home office in Milwaukee, Wisconsin, with branch offices all over the country making appraisals in connection with construction work, insurance work, and, as counsel said, very frequently, less now than formerly, for underwriters. This appraisal was made at the time of the bond issue for the purpose of getting the equity back of the bonds. The bonds were floated up to 60 or 80 per cent of the appraised value of the property.

Mr. Naus: One moment.

The Court: I am asking the question for my own information. I wanted to know what company it was that made this original appraisal.

The Witness: The way it worked, they had men who were experts in construction costs, and they have statistics running [283] back for years.

Mr. Naus: I think they are a well known company.

Q. But the fact is, is it not, that in making their

(Testimony of A. W. Haynes.)

appraisals they make them upon current prices that are quoted for materials and the like?

A. They will fluctuate.

Q. That is to say, in making an appraisal in boom times, back in 1927, they, following the standard appraisal practice, would base their appraisal on the cost of lumber and material, nails and everything as of that time? A. As of that time.

Q. Whatever the current prices are?

A. Yes.

Q. And if the market broke after 1927 on materials and construction and the like, if they made a re-appraisal after the break in the market they would put the appraisal a great deal lower than they made it in 1927, wouldn't they?

A. The appraisal would be at the lower figure, but the depreciation would be less than the company had provided for reserve.

Q. For reserve of what?

A. Reserve for depreciation.

Q. But they have the same depreciation; you say it is a composite? A. Yes.

Q. If the unit prices were lower subsequent to 1927 and you have the same rate of depreciation, it would end up with an appraisal after depreciation of substantially less, wouldn't it?

A. If you are taking your depreciation on the lower basis, you are lowering your depreciation.

Q. We are getting away from the question of value and we are talking about an operation which

(Testimony of A. W. Haynes.)

I have not questioned you about. You know that to be so? A. Yes.

Redirect Examination

Mr. Scampini: Q. The Merchants Ice & Cold Storage Company is a public utility corporation?

A. A public utility corporation [284] under the jurisdiction of the Railroad Commission.

Q. All of its audits and appraisals and monthly earnings statements are required to be filed with the Railroad Commission?

A. They have to be filed.

Q. And the rates which the company is entitled to charge are fixed by the Railroad Commission?

A. That is right.

Q. And arrived at on the basis of a fair return on its invested capital?

A. That is the way the Railroad Commission works.

Q. These appraisals made in 1927 have been used for that purpose, do you know that?

A. I do not know that.

Mr. Naus: Q. Mr. Haynes, how can you say that the Railroad Commission gives them a fair return if it can return nothing but red ink for ten or twelve years?

A. The Railroad Commission is supposed to do that. Most of the public utilities disagree with the Railroad Commission.

Q. What it comes down to is the Railroad Commission has control over the rates, but whether the company makes money or not is another matter?

(Testimony of A. W. Haynes.)

A. The Railroad Commission fixes the rates, that is true, and has its own formula for arriving at those rates, which the utilities usually disagree with.

Q. In the three years of your audit do you say the company had a fair return on its investment?

A. It did not make money.

Q. Had nothing but red ink?

A. That is right.

(Thereupon counsel read the deposition of L. R. Arnold.)

Mr. Brownstone: Now, in connection with the deposition that was read, we would like to offer in evidence the series of letters that have been handed to me by Mr. Scampini.

Mr. Scampini: I have no objection, but I would like to [285] know the judicial purpose of it.

Mr. Naus: Mr. Scampini, either there is an objection or there is not an objection.

Mr. Scampini: I say I have no objection, but I see no use or purpose.

Mr. Naus: Then go ahead and read them.

The Court: I think I indicated they might or might not become material. I don't know the contents of the letters.

Mr. Naus: Correct.

(Testimony of A. W. Haynes.)

The Court: If you want a judicial interpretation, let us hear them.

Mr. Brownstone: There is no objection, so we will offer them, as one exhibit.

The Court: They may be admitted and marked.

(The letters were marked "Defendants' Exhibit D.")

DEFENDANTS' EXHIBIT D

THOMAS H. WINGATE

Attorney at Law

Equitable Building

Wilmington, Delaware

July 16, 1942

Pacific Empire Holdings, Inc.

26 O'Farrell Street

San Francisco, California

Dear Sirs:

I have been retained by a group of stockholders of Pacific Empire Holdings, Inc. who have requested that I file a Bill of Complaint against the corporation, seeking the appointment of a receiver on the ground of mismanagement and for the purpose of having a receiver to bring stockholders' derivative action against the individual directors for mismanagement and waste of the corporate assets. The stockholders also request that I file a petition for a Writ of Mandamus to secure a full and complete examination of the corporation's books and records.

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

I am reluctant to resort to these extraordinary remedies without giving the management an opportunity to state their position. If you care to discuss these proceedings with me, I shall be glad to do so. In the event I do not hear from you on or before July 29th, I shall understand that you do not wish to discuss the matter, and I will proceed to file the proceedings.

Very truly yours,

THOMAS H. WINGATE

W/mlt

WESTERN UNION

Nite Letter

July 27, 1942

Mr. Ivan Culbertson

Attorney at Law

Delaware Trust Bldg.

Wilmington, Delaware

I represent Pacific Empire Holdings Inc., a Delaware corporation, with offices here in San Francisco. Thomas H. Wingate of your city threatens to file suit in your Chancery court for appointment of receiver in a derivative stockholders' suit. Please see if you can talk Mr. Wingate into deferring any action until I have looked into this matter and reported to you. I want you to do this as a personal favor to me, without liability on company as com-

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

pany may not be in position to pay it. Wire me collect. Kindest personal regards.

A. J. SCAMPINI

WESTERN UNION

NF 205 48 Collect—Wilmington Del 30 952A

1942 Jul 30 AM 7 42

A J Scampini

300 Montgomery St S Fran

Conferred with Wingate re Pacific Empire Holdings Inc He agrees to defer filing complaining for reasonable time for you to advise me further. He feels sure he has strong case for receiver and gave me generally his facts. Ave assured him you will not delay unduly. Regards.

IVAN CULBERTSON

August 2, 1942

Mr. Ivan Culbertson,
Attorney at Law,
Delaware Trust Building,
Wilmington, Delaware.

Dear Mr. Culbertson:

Re: Pacific Empire Holdings, Inc.

Since my wire to you of July 29 and your reply of July 30, with respect to the above subject matter, I have been engaged almost continuously in conferences with the officers of the corporation, all

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

of whom are fine men but who, unfortunately, have had an impossible task.

Pacific Empire Holdings, Inc. was formerly known as Calitalo Investment Corporation and also as Associated Calitalo Holdings, Inc., and was organized sometime in 1926 during the boom days and its promoters had the "laudable" ambition of creating a second Bank of Italy organization. They acquired a string of banks up and down the coast and sold approximately two and a half million shares of stock to about 10,000 stockholders. In addition to a string of banks they acquired several other corporations, among them the controlling interest in Merchants Ice and Cold Storage Company, a California corporation, operating the largest cold storage business in San Francisco, and complete ownership of California Pacific Service Corporation, operating a rather large laundry business in Bakersfield.

To make a long story short for the purpose of this letter—with the crash of the market in 1929 and the ensuing depression the corporation lost bank after bank and was subjected to assessment after assessment on its stockholders liability with the result that it became more and more financially involved. The promoting management of the corporation was finally ousted and the present management took office sometime in 1930 and have been conducting a salvaging proposition ever since.

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

For some years I was attorney for the present management but sometime in 1937 I resigned.

The last bank which the corporation owned was the City National Bank of San Francisco which was merged with the Pacific National Bank of San Francisco and as the result of such merger the above corporation became the owner of a block of stock of Pacific National Bank of San Francisco, which block of stock was owned by another subsidiary called the Pacific Empire Corporation. (Organized by myself in 1933 and, incidentally, that corporation has the honor of having filed the first Registration Statement with the Securities and Exchange Commission under the Securities Act of 1933).

The series of assessments levied upon the corporation as a stockholder of the closing banks, coupled with the fact that the Merchants Ice and Cold Storage Company, is principal operating subsidiary, entered upon evil days during the depression, froze the holding company and forced it to liquidate its holdings, including Merchants Ice and Cold Storage Company, at sacrifice prices—yet its liabilities had to be paid in full in every case. The result is that today the corporation owes approximately \$50,000 to general creditors and approximately \$100,000 to its subsidiary, Pacific Empire Corporation, in which subsidiary the corporation owns only 55% of its outstanding stock, the rest being owned by the public.

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

Its only remaining visible assets that I can find are the California Pacific Service Corporation stock which is pledged to secure the payment of approximately \$10,000 to the lawyers who took charge of the situation after my resignation in 1937, and who were engaged to fight some income tax assessments, and some odds and ends.

The really only valuable asset of the holding company is a claim against one Peter Bercut, Vice President and Director of the corporation, who, about a year ago, knowing the financial difficulties of the corporation and being a man possessed of considerable wealth, took advantage of the difficulties and of his position to buy the controlling interest of the corporation in Merchants Ice and Cold Storage Company for the sum of \$35,000 cash when such controlling interest was worth and is worth today not less than \$250,000. This transaction is the transaction which must be rescinded in order to reacquire into the company this very valuable asset so as to make it available to the creditors of the corporation and its stockholders.

The present management is not in a position, practically speaking, to rescind the transaction entered into with Peter Bercut, for the reason that the present management was a party to the transaction. Neither is the corporation in a position to attack the transaction, in a practical sense, for the reason that Merchants Ice and Cold Storage Com-

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

pany claims it has coming approximately \$25,000 from the holding company and since Peter Bercut now owns the Merchants Ice and Cold Storage Company, and runs it, if the corporation were to attempt to rescind the transaction whereby Peter Bercut acquired the said controlling interest he would, logically enough, direct and see to it that Merchants Ice and Cold Storage Company file an attachment and execution on the claim and thus vitiate the proceeding.

Do you get the picture? The corporation has no cash on hand. It has not paid its franchise taxes or corporation trust company fees or Delaware franchise taxes. It is, in other words, insolvent within the meaning of Section 4407 of the revised code of Delaware of 1935 and by reason thereof a receiver should be appointed in Delaware to take charge and possession of all of the assets and effects of the corporation and forthwith rescind the transaction with Peter Bercut and any other transactions of a similar character which may be found to exist.

Any receiver of this corporation so appointed should be what we lawyers understand as a "friendly receiver". I am a creditor of the corporation to the extent of having an unpaid balance due on a note equalling \$500. I also own 3263 shares of the stock of this corporation which years ago cost me considerable money and today is worthless. (When I think

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

of the investments I have made I often wonder why I practice law.)

I suggest the following procedure. I will assign the promissory note to your secretary, Rebecca Tanzer, and transfer the stock to some other person designated by you. Let these two persons, one as a creditor and the other as a stockholder, file a complaint alleging insolvency or imminent threat of insolvency and inability to meet the debts as they mature; alleging further that the corporation can be made solvent by the preservation and conservation of its assets and the prosecution of the claims which it has against persons like Peter Bercut and others; alleging further that the corporation owns no real estate anywhere and all of its property consists of personal property so as to come in within the subsequent provision, namely: Section 4408 of your revised code. See page 305 of the Delaware Corporation Law, annotated 1941.

I can prepare the form of complaint for you, knowing as I do the history of the organization. I would then file the complaint and serve it upon Corporation Trust Company, its resident agent. The Board of Directors here would call a special meeting and adopt a resolution consenting to the appointment of a receiver. The receiver then could designate an agent to represent him here in California, in accordance with Section 4407 of your Revised Code of 1935. I, as such agent, or anybody

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

else appointed as such agent, could take possession of the local offices and represent the receiver in California. Under our decisions a receiver appointed by the courts of a sister state need not be appointed ancillary receiver in order to be entitled to prosecute actions in the courts as such receiver. He need only be appointed ancillary receiver when it is the owner of real estate, and in our case there is no real estate.

Upon the appointment of such receiver the first thing to do would be to rescind the transaction whereby Peter Bercut acquired the controlling interest of Merchants Ice and Cold Storage Company. I am sure that this case would be settled very quickly. Any kind of reasonable settlement should enable the corporation to pay off all of its claims, pay a good fee to the receiver and its attorneys, etc., etc., and probably leave something available for the stockholders.

I have gone into all of the ramifications of the circumstances under which Peter Bercut, while Vice President, Director and member of the Executive Committee, acquired for \$35,000 the controlling interest in Merchants Ice and Cold Storage Company. I think you know me well enough to know that I do not reach hasty decisions in cases of this character. I can tell you, however, that I will win this case hands down and from the result of this

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

phase of the situation ought to come assurance of payment for our services.

I think the corporation can raise about \$500 to assure payment of court costs to initiate the foregoing suggested proceeding. What I want to know from you is can you handle it along the foregoing suggested lines? Do you know Wingate well enough, or anybody else, to arrange with him to represent the plaintiffs in filing the complaint while you appear as attorney for the corporation in consenting to the appointment of a receiver, and do you think that you can have the Chancellor appoint the proper receiver?

Wire me your reaction.

Yours very truly,

A. J. SCAMPINI

AJS:hw

WESTERN UNION (23)

PA4 1 84—DL—DT Wilmington Del 6 949A

1942 Aug 6 AM 7 29

A J Scampini—

300 Montgomery St S Fran—

I have studied carefully your letter of August 2. Your plan feasible and can work out on suggested lines. You should move rapidly as Wingate insisting on going ahead with his complaint. Suggest Wingate for receiver. He will cooperate. Essential you send five hundred dollars to assure carrying

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

out of plan and payment of costs and expenses. Assign your note at once to Tanzer and your stock to Elizabeth Wilhelm. Suggest you send complaint at once as I cannot hold situation here indefinitely. Regards.

IVAN CULBERTSON.

2.

IVAN CULBERTSON

Law Offices

220 Delaware Trust Building

Wilmington, Delaware

August 17, 1942

A. J. Scampini, Esquire

300 Montgomery Street

San Francisco, California

Re: Pacific Empire Holdings, Incorporated

Dear Mr. Scampini:

This will acknowledge receipt of your letter enclosing your check to my order in the amount of \$250.00, as an advance on the deposit for costs in the case against Pacific Empire Holdings, Incorporated. I have prepared and filed the Bill of Complaint and enclose herewith a copy of the same. You will receive notification from the Corporation Trust Company that the Complaint has been served on it.

I have also prepared a form of Answer which

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

should be executed by the President or Vice-President and Secretary of Pacific Empire Holdings, Incorporated and returned to me at the earliest possible moment. I will then engage a local attorney to represent the corporation in filing the answer and appearing before the Chancellor to consent to the appointment of a receiver.

It will be necessary that you send me at once the additional \$250.00 for the costs in this case. As you know, the expenses of a receivership are heavy, and I am unwilling to incur these expenses until I have been supplied with the means of paying them. However, I assume there will be no delay about carrying out your agreement, and for that reason I have gone ahead with the filing of the Complaint.

As soon as the executed Answer is received by me, I can proceed at once to the securing of the appointment of the receiver. We will then expect you to proceed with all dispatch in California to make the former officers respond in damages suffered by this corporation.

With kind regards, I am

Very truly yours,

IVAN CULBERTSON

IC:RT

Enc.

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

August 22, 1942

Mr. Ivan Culbertson

Attorney at Law

Delaware Trust Bldg.,

Wilmington, Delaware

In re Pacific Empire Holdings, Inc.

Dear Ivan:

I enclose certified copy of minutes of a special meeting of the board of directors of Pacific Empire Holdings, Inc. held August 20, 1942, in connection with the complaint filed by Rebecca Tanzer and Elizabeth Wilhelm against the corporation seeking the appointment of a receiver by the Court of Chancery of the State of Delaware in and for the County of New Castle.

You will note that at the meeting a resolution was adopted authorizing a lawyer of Wilmington, Delaware, to appear in said action as attorney for the defendant corporation and in said action file the enclosed answer of the defendant, which has been duly executed and notarized by the officers of the corporation consenting to the appointment of the receiver. I left the name in blank for the reason that I had assumed you would appear as attorney for the corporation, whereas you now advise me that you will appear as attorney for the plaintiffs and that you will select some attorney in Wilmington to appear for the corporation.

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

Please advise me the name of the attorney you will select who will appear for the corporation so that I may insert his name in the original minutes appearing in the minute book.

I enclose my check for \$250.00, being the remaining \$250.00 for costs requested by you in your letter of August 17th.

As soon as the receiver has been appointed, please wire me, and, instead of obtaining an order of the court appointing me as agent in California for the receiver, I recommend that E. R. Prince, a well-known business man of San Francisco and a valued client of mine, be appointed resident agent and that I be appointed attorney for the receiver in California, thus enabling us to take immediate possession of the local offices and proceed with all dispatch towards the marshalling of the assets and prosecution of all claims owned by the company. If a bond be required from Mr. Prince, that can easily be arranged.

Time is of the essence. In order for us to proceed here, we will also have to have, as soon as possible, certified copies of the order of the Chancellor appointing the receiver and appointing the receiver's agent in California and designating me as the attorney for the receiver's agent in California, and authorizing us to take possession and conduct the business and affairs of the corporation until the

(Testimony of A. W. Haynes.)

(Defendants' Exhibit D—Continued)

further order of the court and subject to the jurisdiction and orders of the receiver.

Kindest personal regards,

Very truly yours,

A. J. SCAMPINI

AJS:h

Enc.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Defts. Ex. No. D. Filed 5-5-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

C. J. COLLINS,

called for plaintiff; sworn.

Direct Examination

Mr. Scampini: Q. Mr. Collins, you are connected with the Frostcraft Corporation, are you not?

A. That is right.

Q. That is a California corporation?

A. Yes.

Q. Located where?

A. At 185 Lombard Street.

Q. How long have you been in business?

A. Since March 1, 1937.

Q. Frostcraft Corporation was formed through the efforts of Merchants Ice & Cold Storage Company and Pacific Empire Holdings, Inc., was it not?

A. No, it was not.

(Testimony of C. J. Collins.)

Q. Please tell me, then, its history.

A. Well, four of us started the corporation, and one of the parties worked for the Merchants Ice & Cold Storage Company and he put in money, and [286] we had the matter lined up four ways.

Q. Who owned it?

A. Myself, George Botello, John Hawkins, and Mr. Sherman.

Q. Of the Merchants Ice & Cold Storage Company? A. Yes.

Q. You took a lease of a building from the Merchants Ice & Cold Storage Company, did you not?

A. Yes.

Q. You entered into some sort of contract for the freezing of vegetables and fruits, is that right?

A. We did not have any contract with them, but it was understood that they would do the freezing.

Q. What is the business of the Frostrcraft Corporation?

A. Freezing fruits and vegetables.

Q. Well, if I understand correctly, the Frostrcraft Corporation had a difficult time going ahead, for a while, is that right? A. That is right.

Q. How is it doing now?

A. It is doing much better.

Q. You are selling your products, are you?

A. Yes.

Q. Did the Pacific Empire Holdings, Inc. make any investment in the company?

A. Yes, they made an investment of 200 shares.

(Testimony of C. J. Collins.)

Q. How much is that? A. \$2,000.

Q. Did Merchants Ice & Cold Storage Company make an investment in the company?

A. No, they did not.

Q. Did you become indebted to Merchants Ice & Cold Storage Company for refrigeration?

A. Yes, we did.

Q. How is that indebtedness today?

A. Well, it is improved. I will put it this way: that last year we were able to keep up our current bill, and of course, we still owe for previous years' freezing, part of the bill. [287]

Q. Are you earning any money now?

A. Yes, we had a fairly good year last year.

Q. Now, did the Merchants Ice & Cold Storage Company acquire 500 shares of stock in your company? A. No, they did not.

Q. Do your records show that Merchants Ice & Cold Storage Company became a stockholder in your company? A. No, they don't.

Q. Do you remember stating to me that the Merchants Ice & Cold Storage Company acquired 500 shares of stock in your company?

A. No, not the Merchants Ice & Cold Storage Company.

Mr. Naus: Are you impeaching him now?

Mr. Scampini: I am taken by surprise.

Q. Will you please show me your stock ledger?

A. Yes.

Q. Do you have a certificate for 500 shares of

(Testimony of C. J. Collins.)

the A. M. C. Produce Co.? A. Yes.

Q. Will you please show me that certificate?

A. That is certificate No. 4 for 500 shares issued to the A. M. C. Produce Co.

Q. To whom was this certificate transferred?

A. This certificate was transferred to Peter Bercut and Henri Bercut.

Q. Where did it come from? Who sent it in to you for transfer? A. Mr. Plagaman.

Q. Is he treasurer of the company, as far as you know?

A. I know him as the bookkeeper. I don't know what other title he has.

Q. Have you got the instructions that he sent to you for transfer? A. No, I have not.

Q. Was that certificate ever the property of the Merchants Ice & Cold Storage Company?

A. No, not that I know of. All I [288] know is that Mr. Plagaman brought the certificate up with instructions to issue 250 shares to Mr. Peter Bercut and 250 to Henri Bercut.

Q. Is Mr. Peter Bercut and Mr. Henri Bercut a stockholder in your company?

A. Yes, to the extent of 250 shares.

Q. And the representation of that ownership is this certificate that you have just testified to?

A. Yes.

Mr. Scampini: That will be all.

(Testimony of C. J. Collins.)

Cross Examination

Mr. Naus: Q. Mr. Collins, you spoke of somebody buying some block of stock for \$2,000. When was that?

A. That was in the early part of 1940.

Q. Who made the arrangements with you for the purchase of the stock, what person?

A. Webb Richards is the one that made the request for the stock and instructed me to make it out to the Pacific Empire Holdings Company.

Q. Let me ask you this. If this is the situation, I will scramble it together and save time, if I can. At about the time that that stock was issued Frostcraft owed the Merchants Ice & Cold Storage Company about \$2,000 on a storage bill, Frostcraft issued its check for \$2,000 and then in turn Merchants Ice & Cold Storage Company issued its check for \$2,000 to buy the stock, and it ended with Merchants Ice & Cold Storage buying it and Pacific Empire having it issued to them; is that about the general picture?

A. No, that is not the procedure on that stock. The procedure was I did owe the Merchants Ice & Cold Storage money and they gave me a check for \$2,000. It was of the Pacific Empire Holdings Company. And I issued the stock and then I gave the Frostcraft check. That is, we paid up the Merchants Ice & Cold Storage \$2,000. [289]

Q. To boil it all down, when the transaction was all over with, it wiped out the \$2,000 bill you owed

(Testimony of C. J. Collins.)

for storage and you issued 500 shares of stock. That is what it all boils down to? A. Yes.

H. R. BAKER,

called for plaintiff; sworn.

Direct Examination

Mr. Scampini: Q. Mr. Baker, your name is H. R. Baker? A. Yes.

Q. What is your business or occupation?

A. Senior partner with H. R. Baker & Company, investment securities.

Q. How long have you been in business?

A. H. R. Baker & Company have been in business since 1933.

Q. How many offices do you maintain?

A. Fourteen.

Q. Where are they located?

A. All throughout California from San Diego to Eureka.

Q. How many salesmen are there in your organization?

A. About fifty-five men; not all of them are salesmen.

Q. Prior to organizing the firm of H. R. Baker & Company what were your activities?

A. I was in the investment business for a large New York house.

Q. In New York City?

(Testimony of H. R. Baker.)

A. In New York City and Pittsburgh, Pennsylvania, and in San Francisco.

Q. When did you come to San Francisco?

A. I came to San Francisco in January, 1932.

Q. Are you a member of any exchange?

A. Not at the present time.

Q. Have you been a member of an exchange?

A. Yes, for some time I held a membership on the San Francisco Stock Exchange. [290]

Q. Is your business strictly unlisted securities?

A. Primarily.

Q. Have you had occasion to examine into the financial report of Merchants Ice & Cold Storage Company which I have given to you, the audit for the year 1939 prepared by John F. Forbes & Company?

A. Yes.

Q. I will show it to you and ask you whether or not this is the audit that you studied?

A. Yes, this is the audit.

Q. Have you studied the audit for this company fully, Mr. Baker?

A. Well, not fully. I would say I looked at this audit quite carefully, and of course in studying an audit of this type you have to take into consideration the fact that there are certain figures here based on appraisals made by reputable appraisers, and on which you have got to take their word that these appraisals are accurate.

Q. From your experience in unlisted securities are you in a position to state whether or not when a majority of the stock is owned by a concern and

(Testimony of H. R. Baker.)

there are occasional sales transactions on outstanding stock, whether the market for such stock and such transactions reflect the true reasonable value of those securities?

A. Not necessarily. It all depends on where the control is and what kind of a control it is and what they are doing for the outside stockholders.

Q. Where a situation exists that the transactions are very rare and only involve a small number of shares, and the purchasing power, as it were, is limited to the controlling interest, would the price at which such securities would occasionally be sold be a true reflection of the reasonable value?

A. I would say they would have no reflection on the reasonable value, unless the parties who were making the market wanted to make it such. [291]

Q. Now, in the case of Merchants Ice & Cold Storage Company, Mr. Baker, after examining that balance sheet and the balance sheet for December 31, 1942, December 31, 1940, and the earnings reports for those two years, as well as the audit report of John F. Forbes & Company dealing with 1939, are you in a position to state what in your opinion would be the reasonable value of approximately 65,550 shares of common shares of common stock out of 107,000 shares outstanding and 12,000 shares approximately of preferred stock out of a total of 41,000 shares outstanding on December 31, 1940?

Mr. Naus: If your Honor please, it is obvious that the question is designated to elicit from an open account, from a security man, what now ap-

(Testimony of H. R. Baker.)

pears to be an attempt to make an intrinsic appraisal of intrinsic assets of the corporation, coupled with a substitute of the witness' opinion for the function of your Honor by way of an opinion from a balance sheet, and I object to it as calling for the opinion, conclusion, guesswork, substitution of the witness' opinion for the Court's; and on the further ground that no foundation has been laid that this witness knows about appraising assets as distinguished from the proper sphere of a broker to testify to the condition of the market, if there is a market.

The Court: There is a suggestion I might offer which may or may not be helpful. From an examination of these documents here and these appraisals he may testify what is his opinion, limiting it to the information at hand.

Mr. Naus: He is going to be called upon to testify to the fair value.

The Court: I don't know what he is going to be called upon to testify. I offer that suggestion to both sides. [292]

Mr. Naus: When it gets down to it, this witness was asked to look at a balance sheet subsequent to the transaction here and in the absence of a market say what is the intrinsic value of the shares.

The Court: That goes to the weight of his testimony, if it has any weight at all. Now, as to saying he is invading the province of the Court, I may answer that very frankly to you by saying that any

(Testimony of H. R. Baker.)

help I may get on any financial matter may be of assistance in the case.

Mr. Naus: I suppose your Honor has overruled my objection?

The Court: I will overrule the objection subject to your motion to strike. Proceed.

A. I have not had a chance to examine this 1942 or 1940 balance sheet, and before answering the question based on those I would want an opportunity to study these. I have studied the 1939 balance sheet and earning report, but if I were going to take into consideration what happened since those balance sheets, I would want more opportunity to study these sheets, which I have not had.

The Court: Q. Being a broker, what has been your experience in reference to valuing parcels of property?

A. I might say that for twelve years I was associated with the largest real estate bond house as vice-president and director. Perhaps I should not brag about this, because that firm failed,—that was Strauss—but they changed the skyline of most cities of the United States, such institutions as the Mark Hopkins.

Q. They still line the skies today. The point I wanted to make is this: I wish to straighten out in my own mind this: In determining the values what part, if any, does management play in the corporation in reference to values?

A. A very great [293] part.

(Testimony of H. R. Baker.)

The Court: I thought so myself, but I wanted to get the benefit of an expert. What is before the Court now?

Mr. Scampini: Now I will ask permission for Mr. Baker to study the 1940, 1941 and 1942 reports and return to court tomorrow morning.

The Court: I do not want to mislead you—I would be interested in any appraisal that this gentleman would try to assist me in in the morning, but I do not want to mislead anyone to say that it might or might not impress me.

Mr. Scampini: I understand that. I will ask Mr. Baker to return tomorrow morning.

The Court: Very well.

W. G. EVANS,

called for plaintiff; sworn.

Direct Examination

Mr. Scampini: Q. Mr. Evans, are you the book-keeper and auditor of the Merchants Ice & Cold Storage Company at the present time?

A. No.

Q. You are not connected with the company?

A. I am general manager at the present time.

Q. Have you got with you the appraisal made of the company's property by the American Appraisal Company? A. No.

Q. Is that available to you? A. 1927?

(Testimony of W. G. Evans.)

Q. Yes. A. I think I can get that.

Q. Have you got the assessed values of the company's property available to you?

A. I think counsel has them now.

Mr. Naus: I have a handful of tax bills. They are not added up. If you want to take them along and add them up [294] over night, you may. We have never done it.

Mr. Scampini: Q. Will you bring the appraisal with you in the morning for 1927? A. Yes.

Mr. Naus: Is there anything else you want him to bring?

Mr. Scampini: No. At this time we wish the record to show we offer in evidence the deposition of Mr. Arnold* which has been read in evidence.

The Court: Let it be admitted. We will take an adjournment now until tomorrow morning at ten o'clock.

(Thereupon an adjournment was taken until Thursday, May 6th, 1943, at 10 a. m.) [295]

Thursday, May 6, 1943—10:00 A. M.

Mr. Scampini: May it please the Court, I had occasion to bring Mr. Morrish down last evening and he is a very busy man. May I put him on at this time?

The Court: Yes.

*[Printer's Note]: Set forth herein at page 693.

WILL E. MORRISH,

called for plaintiff; sworn.

Direct Examination

Mr. Scampini: Q. Mr. Morrish, where do you reside?

A. I reside in Berkeley.

Q. What is your present business or occupation?

A. I am president of the Calvada Lumber Company and of the Meadow Valley Lumber Company, and I am an adviser to some other business firms.

Q. Prior to your present business activity were you connected with the American Toll Bridge Company?

A. I was.

Q. In what capacity?

A. I was president of the American Toll Bridge Company.

Q. That company owned the bridge across Carquinez?

A. That is correct.

Q. Antioch?

A. One at Antioch and one at Carquinez.

Q. Those bridges were sold to the State and the company has since been dissolved, is that right?

A. That is right.

Q. Prior to that were you connected with the Bank of America?

A. I was.

Q. In what capacity, Mr. Morrish?

A. I was president of the Bank of America.

Q. For how many years?

A. About three and one-half years. [298]

Q. During what period of time?

(Testimony of Will E. Morrish.)

A. From about the first part of 1931 until the end of 1934.

Q. Prior to that time were you associated for many years with the Bank of America?

A. Yes, I was associated with them about eight years.

Q. In what capacities?

A. Originally as executive vice president.

Q. Prior to that time what were your activities?

A. I had my own bank in Berkeley.

Q. What was the name of that bank?

A. First National Bank of Berkeley.

Q. Now, are you connected with any of the building and loan associations? A. Yes.

Q. Which one?

A. The Building and Loan in Berkeley, Berkeley Guaranty Building and Loan Association.

Q. What is your position there?

A. I am just a director.

Q. How long have you been a director of the loan association?

A. Ten or fifteen years. I can't recall.

Q. In your business career as banker and otherwise, have you had occasion to appraise properties and make loans on such appraisals?

A. I have.

Q. Have you made loans on securities, collateral?

A. Yes.

Q. Now, is it the fact or is it not that during the year 1937 or thereabouts you became a director of the Merchants Ice & Cold Storage Company?

(Testimony of Will E. Morrish.)

A. It was around the first part of 1938.

Q. Will you state the circumstances under which you became a director of the Merchants Ice & Cold Storage Company?

A. I was invited by Mr. Arnold on behalf of the bondholders and trustee for the bondholders to take the position of [299] director, in order to represent the bondholders' interest in the Merchants Ice & Cold Storage Company.

Q. Is it a fact that just prior to your becoming a director of the Merchants Ice & Cold Storage Company it had gone through a reorganization proceeding?

A. That is my understanding.

Q. , And in the course of the reorganization proceeding it was agreed that the trustee for the bondholders would have the right to have representation on the board; is that right?

A. Yes.

Q. Were you selected as the representative on the board?

A. I was.

Q. Who was the trustee under the trust indenture at the time?

A. The Crocker National Bank.

Q. Who represented the bank in the directions and negotiations with you?

A. Mr. Sherman.

Q. And the Crocker First National Bank?

A. Yes.

Q. You were directed to represent the interests of the bondholders and the trustee under the trust

(Testimony of Will E. Morrish.)

indenture of the Merchants Ice & Cold Storage Company? A. I was.

Q. How long did you remain as such?

A. Until the early part of 1941.

Q. At the stockholders' meeting of 1941 you were not elected a director; is that right?

A. That is right.

Q. And that is when your relationship ceased?

A. Ceased.

Q. Now, during the period of time that you were a director on the board representing the interests of the bondholders and the trustee under the trust indenture, did you make it your business to look into the operations of the company and its properties and activities? A. Yes, I did.

Q. Will you state whether or not you kept a record of the operations of the company's affairs during that period of time [300] that you were on the board?

A. Yes. I was furnished with a statement of the company and I used to make a running record of those statements to see what position the company was in and see whether we were making progress.

Q. Did you examine and look into the maintenance of property? A. I did.

Q. Did you meet regularly with the board of directors? A. I met with the board.

Q. What was your position on the board?

A. Well, originally I was merely a director, but in 1940 I believe I was elected chairman of the board.

(Testimony of Will E. Morrish.)

Q. At the time that you became a director who was the president of the Merchants Ice & Cold Storage Company? A. Mr. Sherman.

Q. Did you have in the course of your being a director while he was president any act or occurrence in the management of the company under the presidency of Mr. Sherman which caused you to protest? A. Yes, I did.

Q. What did you find, Mr. Morrish?

A. I found that the company was being operated very inefficiently and that there were many questionable things going on in the company. It is rather difficult to name them all, because some of them were minor, but in general the company was not being run as it should be.

Q. At that time was Mr. Maffei a director on the board of directors? A. He was.

Q. Was Mr. Arnold a director?

A. He was.

Q. Was Mr. Maffei vice president of the company? A. He was.

Q. Now, were you drawing a salary during this period of time for your activities?

A. I drew \$100 a month up until the time I was made chairman of the board.

Q. Then what did you draw? A. \$200.

[301]

Q. \$200 a month? A. Yes.

Q. Did you devote much time to the concern?

A. I gave practically a day a week to it, half a

(Testimony of Will E. Morrish.)

day always, and then evenings with Mr. Arnold, and conversations at various times.

Q. Now, when Mr. Sherman died, will you state what happened in regard to the management of the Merchants Ice & Cold Storage—what changes took place?

A. Well, prior to the time that Mr. Sherman died he severed his relations with the company.

Q. Under what circumstances did he sever his relations with the company?

A. Under the pressure of the trustee, and Mr. Arnold and the board of directors.

Q. He was compelled to sever his relations?

A. Yes.

Q. And ceased being either a director or president of the company? A. Yes.

Q. When he ceased being a director and president there was a block of stock that was owned by William Sherman of the Merchants Ice & Cold Storage Company. Did you know anything about that, whether that was purchased by the holding company? A. No, only from hearsay.

Q. Now, Mr. Morrish, did you own any stock in the company yourself? A. No.

Q. You had no personal interest in the concern other than that you wanted to do your job for the trustee who had you on the board?

A. Yes. I did not own any stock.

Q. You were, of course, devoting practically all of your time to your other business activities, weren't you? A. Yes.

(Testimony of Will E. Morrish.)

Q. You were doing a good job on the board because you had been requested by the Crocker Bank; is that right? A. Yes.

Q. When Mr. Sherman ceased his connection with the company what, if anything, with relation to the management—what changes [302] took place? Tell us all the facts.

A. When Mr. Sherman ceased as president, Mr. Arnold had asked me at one time to become president of the corporation, and I told him at the time that I did not care to assume that responsibility, but later he insisted that I do that, and he was cooperating at the time and trying to clean up the company, and both the Crocker Bank and the bondholders thought that I should go in there as president. So I finally agreed with Mr. Arnold to do that. However, just prior to the directors' meeting in which that was to happen, Mr. Arnold told me that the Pacific Empire Corporation board had decided that he should go in as president.

Q. What did you do?

A. Then he suggested that I go in as chairman of the board. I went back to the Crocker Bank. I thought at first I should resign. I went back to the Crocker Bank and the Crocker Bank insisted that I stay on the board, and having undertaken the job I stayed with it.

Q. You stayed with it until February of 1941, is that right? A. That is right.

Q. Did you watch closely the operations of the company under the management of Mr. Arnold?

(Testimony of Will E. Morrish.)

A. I did.

Q. Will you state from the records that you got and from your examination of the financial reports and business operations of this company and your own activities in the company whether or not the company's financial condition improved during the year 1939 from the year 1938.

A. There was a general improvement in the condition of the company during those years.

Q. There was a gradual improvement; is that right? A. Yes.

Q. When did Mr. Bercut become a director of the Merchants Ice & Cold Storage Company, do you recall?

A. I think that—I am not positive about it, but it was during the time I was [303] made chairman of the board.

Q. During the year 1940 did you observe any retraction of the condition of the company, or did you observe any gradual improvement?

A. There was a temporary improvement under Mr. Arnold's management for a period of three or four months, and then it began to take the same trend as it had previously under Mr. Sherman.

Q. Now, Mr. Morrish, at this particular time, sometime during the year 1940, were you asked by Mr. Arnold to make a loan to Pacific Empire Holdings, Inc.? A. Yes, I was.

Q. How much was that loan?

A. He needed \$3,000.

(Testimony of Will E. Morrish.)

Q. Did you ask for some collateral?

A. I asked him for collateral.

Q. What collateral was given you for the loan?

A. He gave me stock of the Pacific Empire Holdings.

Q. Of the Merchants Ice & Cold Storage Company?

A. Merchants Ice & Cold Storage Company.

Q. How many shares of Merchants Ice & Cold Storage Company were pledged as security for that loan?

A. 1,500, I think.

Q. Of common? A. Common.

Q. Would you say that loan was adequately secured?

A. Yes.

Q. Would you say that a loan of \$2 a share on common stock was not a bad loan?

A. At that time, with the progress of the company, I felt that the security was adequate.

Q. Have you been paid the loan?

A. The company paid me \$200 and you as trustee, or whatever capacity you were acting in, paid me the balance.

Q. You returned the stock to the referee, did you?

A. I did.

Q. Will you please state, Mr. Morrish, from the records that you have kept in your own handwriting, as I have observed, [304] and from the financial reports of the company which you have examined, and from your own knowledge of the condition of this company what in your opinion

(Testimony of Will E. Morrish.)

was the reasonable, fair net worth of this company at the end of the year 1940, after making full allowance for all of its obligations and liabilities?

A. Well, I would have to refer to some figures that I have here.

Q. Will you please state to what you are referring?

A. As I stated, I have kept a running account of the comparison of the assets and liabilities of the company, and figured that the company in 1940 was making progress and that we were just on the verge of going into a period of very good times when it was sold. The figures that I have got down here were what I called distress figures, and figures that I believe that the company could have liquidated for.

Q. By the company you mean the Merchants Ice & Cold Storage Company?

A. The Merchants Ice & Cold Storage Company, yes. The assets as I wrote them down were \$1,576,000.

Q. At what time?

A. I reduced the land values down to \$700,000 as compared with the book value of \$865,000. I am just giving the regular figures, not the odd figures. The buildings I reduced from \$1,003,000 down to \$750,000, and the real estate—there was a small item of other real estate that I put in at \$20,000. The cash, of course, was, the accounts receivable, the same, because they had already set up a reserve

(Testimony of Will E. Morrish.)

for loss, and the bottles that they had for sale, which were later sold at \$7,500, giving me a total of \$1,576,000. That is a reduction in the assets as shown by the books of over \$400,000—between \$400,000 and \$450,000.

Now, on the liabilities side I figured the bonds had to be paid in full at \$659,500. There was an indebtedness to Pacific [305] Empire of \$9,500, which I included, and mortgage on other real estate of \$12,000; notes payable \$3,200; accounts payable, \$160,000, and a reserve for contingencies, \$15,000, or a total of \$859,000. Now, that left a net value or a knockdown value, as I expressed it, of \$716,000. I considered the preferred stock was probably worth its book value.

Q. That is \$10 a share?

A. \$10 a share.

Q. Par value, you mean by saying "book value"?

A. The par value, not the book value. That left in the neighborhood of \$300,000 value for the common stock.

Q. How many shares of common stock were there outstanding? A. 65,000-odd shares.

Q. How many shares of Merchants Ice & Cold Storage were outstanding? A. 107,000.

Q. 107,000? A. Yes.

Q. How much per share of common stock would you say there was reasonably behind the outstanding common as of December 31, 1940, upon the basis of your analysis?

(Testimony of Will E. Morrish.)

A. Well, basing the preferred at book, it left around \$2.80 a share value for the common.

Q. For the common? A. Yes.

Q. Now, Mr. Morrish, from your own knowledge of the condition and history of this company and the nature of its property and its maintenance of property and its business problems, would you say or have you formed any opinion with respect to whether or not the sale by Pacific Empire Holdings to Mr. Peter Bercut on or about January 8, 1941, of a block of stock in this company. Merchants Ice & Cold Storage Company, consisting of a little over 65,000 shares of common out of 107,000, and a little over 12,000 shares of preferred out of approximately 41,000 shares [306] outstanding for the sum of \$35,000 was a fair sale?

A. No, I think not.

Q. Have you formed any opinion as to what in your opinion was the reasonable value of that block of stock of 65,000 shares of common and 12,000 shares of preferred owned by Pacific Empire Holdings on or about January 8, 1941?

A. Well, I certainly think they should have been worth about \$200,000 to \$250,000, somewhere around there.

Q. At that time? A. Yes.

Q. In view of the fact that the company, as the exhibits now in evidence reflect, reported for the year 1941 a net profit, after allowing the sum of \$75,286.93 for depreciation,—still reported net profit

(Testimony of Will E. Morrish.)

of \$4,495.50 for 1941; and for the year ending December 31, 1942, after allowing the sum of \$77,124.68 as depreciation, reported a net profit of \$156,401.98, what in your opinion is the reasonable value of this block of stock on the basis of this improvement in business now being enjoyed by the company?

Mr. Naus: You mean at the present time?

Mr. Scampini: At the present time.

A. Well, in order to come to a conclusion on that I would have to take the statement and analyze it before I could give you a proper answer.

Q. I think that is fair. Would you say the value of that stock would be substantially higher than the value——

Mr. Naus: One moment. He has already told you.

Mr. Scampini: I will withdraw the question.

Q. Mr. Morrish, when did you first hear of the fact or learn of the fact that Pacific Empire Holdings had disposed of this block of stock?

A. Just prior to the annual meeting. [307]

Q. State under what circumstances you were advised.

A. Mr. Arnold came to me and told be he had decided that he had fooled around with the company long enough and that he was going to sell it to Mr. Bercut and that the price that he was going to get for it was \$45,000.

Mr. Naus: One moment. I understand you were

(Testimony of Will E. Morrish.)

calling for something said between him and Mr. Arnold, Mr. Bercut not being present, and I object to it as being hearsay and outside of the presence of the defendant Bercut.

Mr. Scampini: It is admissible against the defendant Arnold, your Honor. I think before the evidence is through it will be connected up with Mr. Bercut.

Mr. Naus: This is not admissible against the defendant Bercut.

The Court: I will allow it at this time subject to your motion to strike and over your objection. I understand that it is going to be connected up.

Mr. Naus: I will reserve my objection until the conclusion.

Mr. Scampini: Q. Will you continue?

A. —\$45,000 for one-half of the holdings of the Pacific Empire Holdings Corporation.

Q. What did you say to him?

A. I told him that I thought it was a steal at that price.

Q. Had you had occasion to see Mr. Arnold often during the period of time that you were associated with the Merchants Ice & Cold Storage Company? A. Quite often, yes.

Q. And for a period of five or six months prior to this discussion that you had with Mr. Arnold had he called upon you on some of his trips up to Sacramento?

(Testimony of Will E. Morrish.)

A. Yes, he had stopped [308] in once or twice at the bridge where I was located.

Q. Can you state approximately the time when he stopped the first time?

A. Well, I would say sometime in 1940.

Q. The middle part of the year? A. Yes.

Q. What, if anything, did he say to you when he stopped to see you?

A. Well, he told me he was on his way to discuss matters with Mr. Bercut.

Q. On his way where? A. At Sacramento.

Q. Did he say anything else to you with respect to his relationship with Mr Bercut?

Mr. Naus: One moment. Here is a supposed talk about another man. Mr. Bercut was not present, and I object to this.

The Court: I will allow it under the same ruling, namely, that it is going in over your objection subject to a motion to strike.

A. Mr. Arnold made the statement that he was doing some special work for Mr. Bercut, and he and Mr. Bercut were very close.

Mr. Scampini: Q. When was it that you were finally advised that this block of stock had been disposed of by Pacific Empire Holdings?

A. Not until after the title passed.

Q. Were you always under the assumption that they had only sold half of the stock?

A. I was.

(Testimony of Will E. Morrish.)

Q. Your assumption was based upon what Mr. Arnold told you; is that right? A. It was.

Q. Now, prior to February 15, 1941, did you attend a meeting at the Commercial Club at which meeting there were present Mr. Bercut and Mr. Arnold? A. I did.

Q. What was it, a luncheon meeting?

A. A luncheon meeting.

Q. Who got the meeting together?

A. Mr. Arnold.

Q. What was the purpose of the meeting?

A. Well, I did not [309] know Mr. Bercut very well, and Mr. Arnold wanted me to become better acquainted with him. Mr. Arnold thought I should remain on the board, and he handled this meeting with Mr. Bercut, I suppose, to get us a little better acquainted.

Q. Will you state to the best of your recollection what Mr. Bercut said at this meeting and what you said and what Mr. Arnold said?

A. Well, we talked of matters in general, and we finally discussed the matter of whether I was to remain on the board. And Mr. Bercut asked me to remain, and I agreed at that time and we shook hands on it, that I would remain on the board, but prior to accepting that I had again gone to the trust company and asked them if they wished me to remain on it. I would have preferred to have gotten off, but they still insisted that I stay on.

Q. Now, at this meeting was anything said with

(Testimony of Will E. Morrish.)

respect to acquiring stock and bonds of the company?

A. Well, Mr. Bercut made the suggestion, or it was discussed, that the company was going ahead, and there was some money to be made in the purchase of stocks and bonds.

Q. What did you say?

A. I don't remember what the answer was. I was simply sitting there.

Q. Who made the suggestion?

A. Mr. Bercut.

Q. On February 15, 1941, then you ceased being connected with the company, is that right?

A. Yes.

Q. Do you know whether or not toward the latter part of 1940 there were indications leading you to believe that the company was about to enter upon a period of increased business activity?

A. The prospects for the coming year were very good at that time.

Q. What was the condition of the laundry company at the Pacific National Bank at that time, if you know?

A. I could only give [310] you that from hearsay.

Q. Were you advised of any pressure on the part of the bank?

A. Not from the Pacific National Bank. I was in there constantly, but I had never been approached by the bank on account of their loan.

(Testimony of Will E. Morrish.)

Q. Were there any special problems that were pressing in the company at this time?

A. I think there was one matter in regard to a loss on some trust receipts. That was quite a problem.

Q. Was that a matter which in your opinion involved the solvency of the company?

A. No.

Q. Was the matter which occurred in the normal course of operation of business of that company?

A. It was rather a large loss, but it is one of those things that happen in your business.

Q. This concern, the Merchants Ice & Cold Storage Company, is quite an old concern, is it not?

A. I think it has a long record.

Q. It goes back to 1890, doesn't it?

A. Yes.

Q. It enjoys quite a high percentage of the cold storage business of the Bay counties, does it not?

A. Yes.

Q. Is it favorably located?

A. Very.

Q. On the Embarcadero?

A. Yes.

Q. Well supplied with spur tracks and shipping facilities?

A. Yes.

Q. In your opinion were the prospects of that company in the future good or bad at the end of 1940?

A. Good.

Mr. Scampini: You may take the witness.

(Testimony of Will E. Morrish.)

Cross Examination

Mr. Naus: Q. I agree with you, Mr. Morrish, that it is a pretty old concern, and you seem to be more or less familiar with [311] it. Would you tell me, please, the last year before the beginning of the year 1941 in which the result of the operations of the Merchants Ice & Cold Storage Company showed a profit for the year rather than a loss?

A. I will ask you to repeat that.

Mr. Naus: Will you repeat the question?

(Question read.)

A. I still do not understand the question.

Q. Well, I will break it down to simply this: You run the business; let us assume you run the calendar year business, you close the business; at the end of the year, then, your operations either show a loss or a profit, don't they? A. Yes.

Q. That, I assume, is what was done at the Merchants Ice & Cold Storage Company. Now, what I want *to is*, going backward from January 1, 1941, and searching through the records of the Merchants Ice & Cold Storage Company throughout the years, what was the last year before January 1, 1941, in which the operations of the Merchants Ice & Cold Storage Company resulted in a profit for the year rather than a loss for the year?

A. I did not see the 1940 statement. To my recollection, the last statement that I had was the 1939 statement.

Q. Well, would you still answer the question: So

(Testimony of Will E. Morrish.)

far as you know, based upon these various positions—you were director and chairman of the board and you were trustee of the bondholders, and the like—what was the last year before January 1, 1941, so far as you have any knowledge, in which the operations of the Merchants Ice & Cold Storage Company showed a profit for the year rather than a loss for the year?

A. It showed a loss each year for the two years that I was associated with it. [312]

Q. That still does not quite meet the question. Can you tell me the last year before January 1, 1941, in which the Merchants Ice & Cold Storage Company was ever operated at a profit rather than at a loss? A. No, I could not say.

Q. Can you tell me whether or not the aggregate loss from the operation of the Merchants Ice & Cold Storage Company for ten consecutive calendar years ending December 31, 1940, aggregated a loss for those ten years exceeding \$10,000,000?

A. I never figured what the aggregate loss was except as I saw it on the statements.

Q. As you sit there on the stand and after all of the connections you have had with Merchants Ice & Cold Storage Company and from any investigation you have made or from any accounting analysis you have ever made, can you tell me one year before January 1, 1941, in which Merchants Ice & Cold Storage Company was operated at a profit for the year?

(Testimony of Will E. Morrish.)

A. I could not answer.

Q. Now, you have referred to some notes of some sort when you testified. Will you be good enough to let me see them, please, whatever you testified from?

A. Yes.

Q. Is that entirely all that you referred to?

A. Yes.

Mr. Naus: May I examine it a moment, your Honor?

The Court: Yes.

Mr. Naus: Q. When did you prepare this, Mr. Morrish?

A. I took that off of some figures here I prepared in 1939. I took that off the statement that I kept, a running record of the statement I had issued by the public accountant. I did that about a month ago.

Q. This paper that I hold in my hand was written by you at one sitting about a month ago?

A. This is the only record that [313] I have kept. I have destroyed all of the records that I kept with this one exception, and when I was subpoenaed I got this paper up.

Mr. Naus: May I have this first paper that has been in my hands so far marked for identification, if your Honor please?

The Court: It may be.

(The paper was marked "Defendants' Exhibit E for Identification.")

(Testimony of Will E. Morrish.)

DEFENDANTS' EXHIBIT E

MERCHANTS ICE

Dec. 31, 1939

Assets

	Book	My Val.
Land	\$ 86,608.55	\$ 700,000.00
Building	1,003,302.97	750,000.00
Real Est.	27,992.42	20,000.00
Cash	6,415.57	6,415.57
Accts. Rec.	92,144.40	92,144.40
Bottles	7,500.00	7,500.00
	<hr/>	<hr/>
	2,002,963.91	1,576,059.97

Difference between book and my appraisal..... \$426,903.94

This leaves out the following:

Inv. in Sec.....	26,437.40
Due from Globe.....	23,874.94
Def. Charges	59,772.25

Liabilities

Bonds	\$ 659,500.00
Pac. Empire	9,585.27
Mtge. Other	
Real Est.	12,100.00
Notes Pay.	3,258.42
Accts. Rec. Pay.	160,383.27
Reserve Conting.	15,000.00
	<hr/>
	859,826.96

My valuation assets.....	\$1,576,059.97
All liabilities	859,826.96

Net value	716,233.01
Preferred Stock at book.....	416,150.00
	<hr/>
Balance for Com. Stock.....	300,083.01

(Testimony of Will E. Morrish.)

Common Stock outstanding:

107,118 shares. Taking my value of assets, $300083 \div 107118$
or 2.80 per share.

Value of Pac. Empire Holding sold to Bercut:

12,000 shares Preferred @ \$10	120,000
65,000 shares Common @ \$28	184,000

Total value	304,000
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Sold for \$35,000.

Should add some value for control.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No.
22339R. Defts. Ex. No. E Ident. Filed.....

Walter B. Maling, Clerk.

Mr. Naus: Q. The clerk has now marked that first paper Defendants' Exhibit E for identification. With that in mind, Mr. Morrish, would you now hand me any and all papers that you have here from which you compiled this as a summary?

A. I have not got the statement here. That is where I got it. I had the annual statement prepared by the auditor; that is where I took those figures from.

Q. Perhaps I can clear that up. You had before you one or more annual statements when you prepared that? A. No, I had one only.

Q. For what year? A. 1939.

Q. You had the Forbes report for the calendar year December 31, 1939. Does that identify it?

A. Yes, but I had my own figures here.

(Testimony of Will E. Morrish.)

Q. Will you now hand me those two sheets, adding the above report mentioned, comprising the basis of the summary that is now Defendants' Exhibit E for identification?

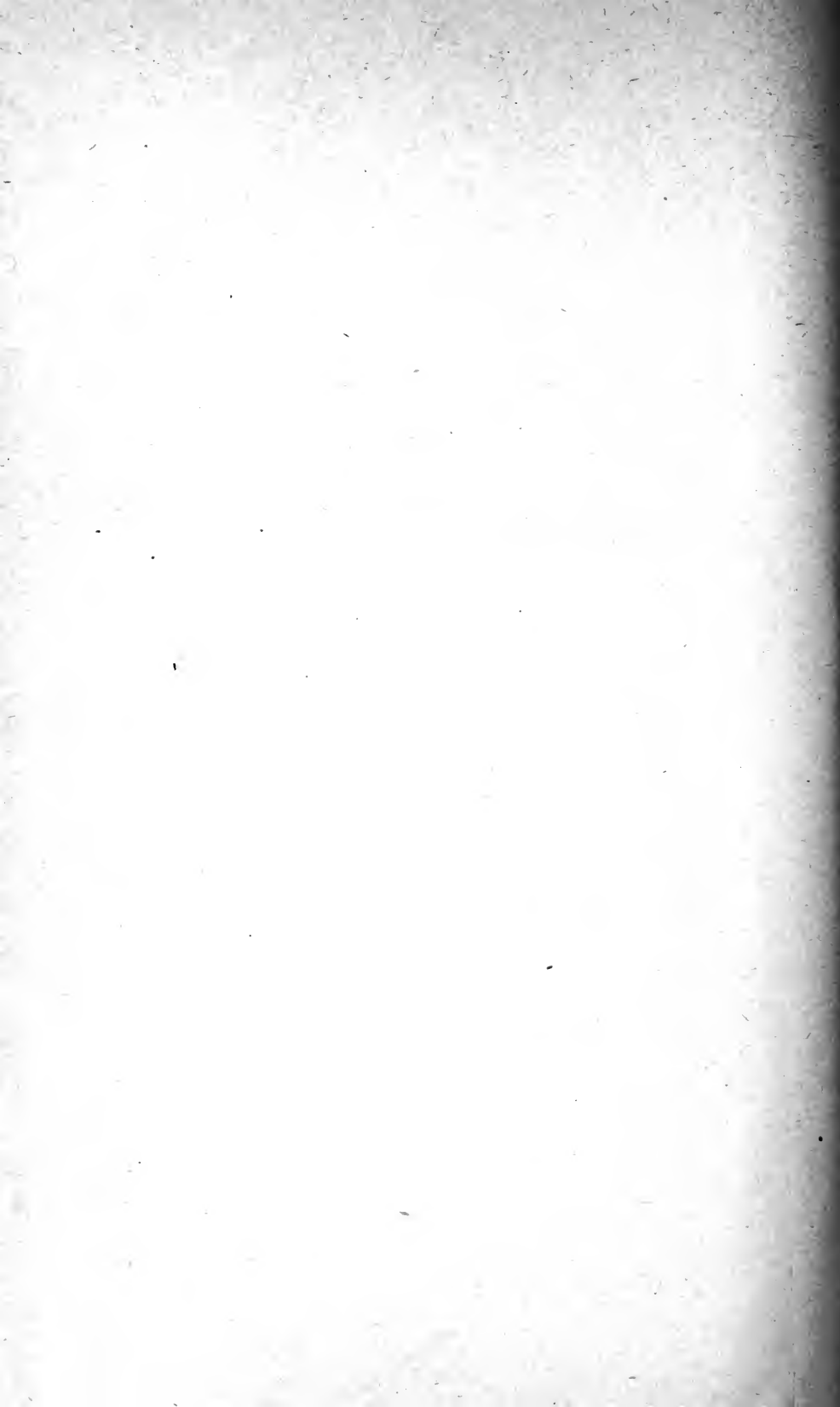
A. You mean these, plus my recollection?

Q. I just want the papers, please.

Mr. Naus: May I have these marked for identification, your Honor?

The Court: Yes. [314]

(The papers were marked "Defendants' Exhibit F for Identification.")



(Testimony of Will E. Morrish.)

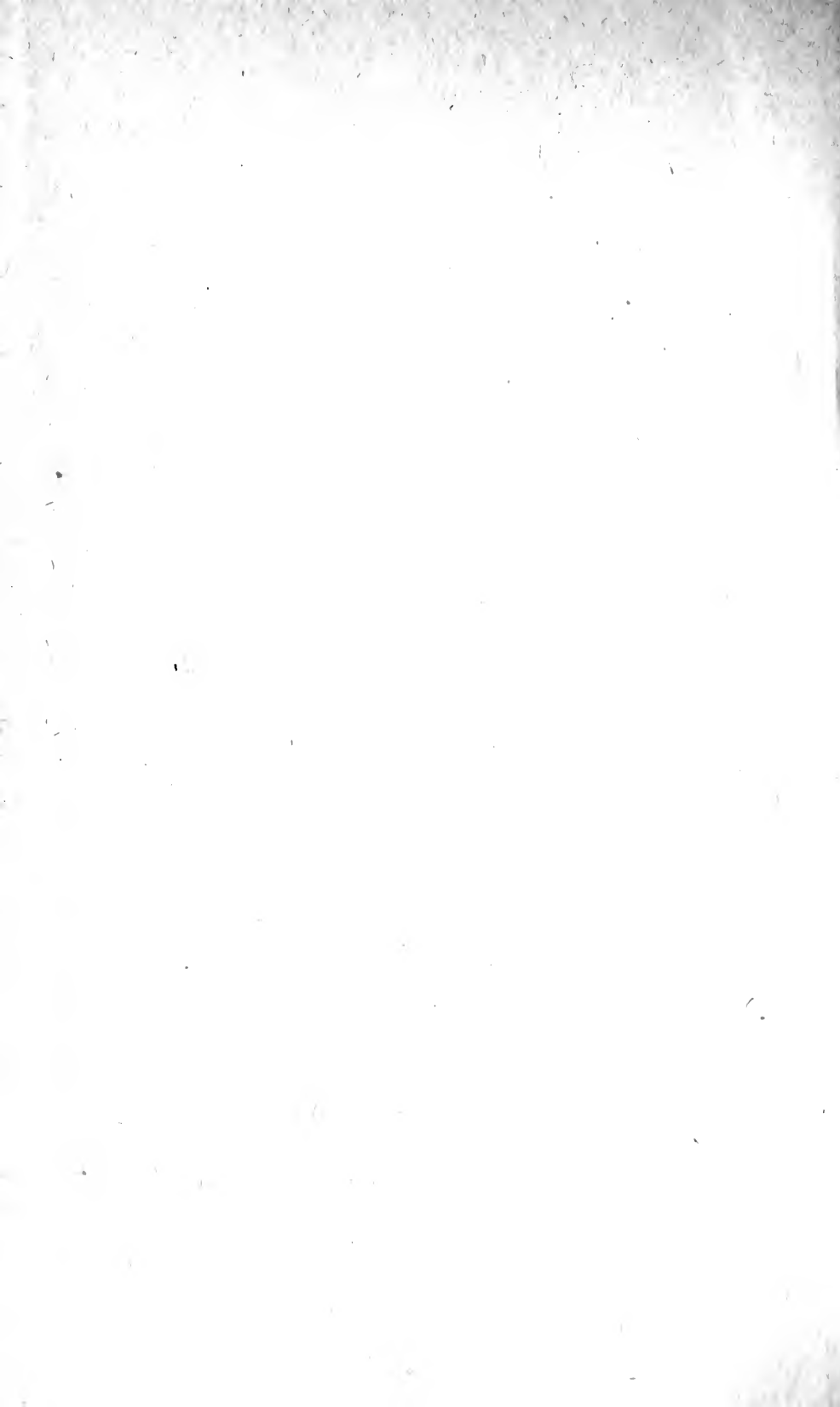
DEFENDANTS' EXHIBIT F
MERCHANTS ICE & COLD STORAGE CO.

	1939					1940								
Assets	July 31	Aug. 31	Sept. 30	Oct. 31	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.
Property.....	1,974,159.98	1,974,159.98	1,974,159.98	1,974,716.18		1,976,108.68	1,898,334.12	1,900,561.79	1,901,510.10	1,902,382.62	1,903,793.01	1,909,161.41		1,914,080.26
Securities.....	26,437.40	26,437.40	26,437.40	26,437.40		37,137.40	46,302.62	46,302.62	46,302.62	45,302.62	45,302.62	42,309.82		39,938.56
Cash.....	2,002.21	5,112.56	3,890.49	3,305.68		6,317.47	4,070.11	2,331.37	4,156.18	1,773.60	2,946.49	2,723.14		2,010.97
Notes, Acct. Receivable.....	102,081.94	146,244.92	129,364.10	123,631.57		119,933.43	107,315.78	105,428.81	84,556.27	92,122.86	101,470.91	102,046.74		156,545.21
Deferred Charges.....	82,453.61	80,092.21	79,770.01	83,995.67		65,010.31	58,284.41	61,100.73	60,332.27	59,682.29	60,129.43	48,682.42		48,428.40
Total.....	2,187,135.14	2,242,167.84	2,209,731.49	2,208,780.82		2,204,507.29	2,114,307.04	2,115,725.52	2,096,857.44	2,101,263.99	2,113,642.46	2,104,923.53		2,161,003.40
Liabilities:														
Capital Stock.....	1,415,725.00	1,415,725.00	1,415,725.00	1,415,725.00		1,415,725.00	1,415,725.00	1,415,725.00	1,415,725.00	1,415,725.00	1,415,725.00	1,415,725.00		1,415,725.00
Mortgage Bonds.....	659,500.00	659,500.00	659,500.00	659,500.00		659,500.00	659,500.00	659,500.00	659,500.00	659,500.00	659,500.00	659,500.00		659,500.00
Mortgage Payable.....	12,600.00	12,500.00	12,400.00	12,400.00		12,100.00	12,100.00	12,000.00	12,000.00	11,900.00	11,800.00	11,700.00		11,500.00
Loans, Stockholders, Others.....	37,669.66	35,312.80	31,021.71	30,667.21		26,095.40	20,981.42	16,170.96	11,503.54	29,546.72	24,354.13	20,836.96		13,460.71
Current Liabilities.....	175,068.27	188,335.49	164,979.96	158,707.18		144,734.96	152,432.62	157,529.61	143,308.80	129,435.28	148,055.17	144,397.48	†	
Notes to Banks, Sec.....	91,359.23	97,954.14	92,485.72	82,679.41		62,148.15	65,164.31	64,569.00	43,522.26	45,160.80	70,897.10	74,445.35		95,299.19
Notes and Contracts Payable.....	7,366.33	6,120.21	5,125.47	3,697.04		9,104.20	8,505.43	7,487.34	8,347.88	7,647.64	6,614.97	9,615.41		11,191.26
Acct. Payable Trade.....	22,305.36	23,351.68	22,979.91	23,024.37		10,171.59	16,210.57	21,042.29	20,738.96	22,387.98	23,014.32	22,182.45		27,861.17
Income Tax.....	6,029.90	6,029.90	5,779.90	5,779.90	Inst.	9,347.69	6,811.67	6,811.67	6,811.67	6,811.67	5,612.03	5,162.09		1,963.59
						6,252.40								
Property Taxes.....	22,555.91	29,255.91	25,955.91	27,655.91		22,308.69	24,997.83	26,697.83	28,397.83	30,097.83	23,153.48	12,372.20		
State Unemploy. Reserve.....	5,905.86	6,829.87	7,150.85	6,908.42		8,174.64	8,050.93	6,620.57	7,366.60	8,140.97	7,757.45	5,137.45		4,780.36
Accrued Wages.....	2,789.99	3,509.08	3,141.35	3,103.25		2,385.71	3,351.83	2,010.05	2,823.95	1,825.19	1,042.37	2,081.38		8,006.72
Purchase Pref. Stock.....	1,225.00	1,175.00	1,125.00	1,075.00		975.00	925.00	875.00	825.00	750.00	750.00	—		750.00
				1,102.62}										
Accrued Int.....	15,451.52	19,030.53	1,156.68	3,572.29}		13,782.84	14,289.16}	19,854.92	23,413.71	5,552.26	7,144.55	10,716.84		17,861.45
							2,064.95}				88.93	1,934.31		1,934.11
Other Accts. Pay.....	79.17	79.17	79.17	79.17		84.05	2,060.94	1,560.94	1,060.94	1,060.94	—	—		—
Deferred Credit.....	200.00	200.00	200.00	200.00		200.00	—	—	—	—	—	—		—
Reserve for Contingencies.....	15,000.00	15,000.00	15,000.00	15,000.00		15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00	15,000.00		15,000.00
Surplus.....	128,627.79	94,526.22	89,095.18	83,418.57	—	68,848.07	161,432.00	160,200.05	160,179.90	159,843.01	160,791.84*	162,235.91*		128,930.22*
Total.....	2,187,135.14	2,242,167.84	2,209,731.49	2,208,780.82		2,204,507.29	2,114,307.04	2,115,307.04	2,096,857.44	2,101,263.99	2,113,642.46	2,104,923.53		2,161,003.40

*Denotes red figures.

†Illegible.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Deft's Ex. No. F Ident. Filed Walter B. Maling, Clerk.



(Testimony of Will E. Morrish.)

Mr. Naus: Q. Now, that Defendants' Exhibit F for identification, that has been drawn up from the books of the secretary of the company, has it not?

A. That was drawn up from the monthly report that was furnished to me by Mr. Arnold.

The Court: For the purpose of the record, identify it.

Mr. Naus: Q. I show you, Mr. Morrish, Defendants' Exhibit F for identification. Will you describe that to his Honor, please.

A. That is the comparative report that I took care of personally from the monthly statement that was issued to me by Mr. Arnold.

The Court: Q. During the months of 1939?

A. It runs from July 31, 1939 to August, 1940.

Mr. Naus: Q. Would this be a fair statement: You took the type of statement that the annual statement is, but instead of making it for a whole year, making it month for month, and then had a monthly statement instead of an annual statement. It is the same type of statement?

A. It is the same type of statement, but it is a month-to-month picture of it.

Q. Referring to Defendants' Exhibit E for identification, in looking at that I take it that is what you gave your testimony from with respect to values and figures?

A. That is right.

Q. In your judgment? A. Yes.

Q. That is as of what date?

A. About thirty days ago.

(Testimony of Will E. Morrish.)

Q. I understand, but values as of what date?

A. That was taken off of the December 31, 1939, statement.

Q. Might I ask this: Was the purpose of this to arrive at your personal opinion of the value as of December 31, 1939?

A. It was to check my personal opinion of the value that I had [315] expressed to Mr. Arnold at the time.

Q. Just to simplify it, this Defendants' Exhibit E for identification purports to show a valuation as of what date?

A. As of December 31, 1939.

Q. Now, you have written the value of the land below what it was carried on the books?

A. Yes.

Q. That is because in your opinion the land was not worth what it was shown on the books to be worth?

A. I think I testified that this was a knockdown value that I was giving in case of liquidation.

Q. I will repeat my question: Isn't it the fact that on Defendants' Exhibit E for identification you put the value of the land below what is shown on the books because in your opinion it was not worth what it was shown on the books to be worth?

A. I think it is worth a whole lot more than that now.

Q. As of December 31, 1939, did you put this value down below what is shown on the books be-

(Testimony of Will E. Morrish.)

cause it was not, in your opinion, worth what it was shown on the books?

A. Only as a knockdown value.

Q. A liquidating value, is that it?

A. That is right.

Q. Now, you have written the value of the buildings down roughly a quarter of a million below what the books show, haven't you? A. Yes.

Q. A quarter of a million below what the books show the depreciated value of the buildings to be?

A. Yes.

Q. And after going through these calculations you end up with an asset value of roughly \$1,596,000? A. Yes.

Q. Is that right? A. Yes.

Q. Then according to your answers to Mr. Scampini as to the value of the common stock per share, you reached that figure—what [316] was it?

The Court: \$2.80.

Mr. Naus: Q. \$2.80. Do you have that in mind?

A. Yes.

Q. You reached that by a method of calculation of what you deemed to be the liquidating value of the assets minus liabilities and then divided that by a certain number of shares?

A. That is correct.

Q. Is that the method?

A. That is right.

Q. Is that the way you got this? A. Yes.

Q. Now, in doing that you took \$1,500,000 of

(Testimony of Will E. Morrish.)

assets and then subtracted, of course, the bond issue of \$659,500? A. Yes.

Q. And then you subtracted further liabilities?

A. Yes.

Q. Now tell me actual amount of payables you deducted under the head of liabilities other than the bond issue, or if you have not added it up I can do it.

A. On just a quick computation here it shows about \$203,000.

Q. \$203,000 payables over and above the bond issue? A. Yes.

Q. Then you subtract what for the liquidating value assignable to the preferred shares before reaching a value for common?

A. I valued the preferred stock on the book at \$10.

Q. Well, now, you say "the book." The preferred had a par of \$10 a share, didn't it?

A. Yes.

Q. And there were 41,615 shares outstanding, weren't there? A. Yes.

Q. So you assigned to the preferred \$416,150, is that correct? A. That is right.

Q. You know it is cumulative preferred, don't you? A. I do.

Q. Cumulative as to dividends and as to priority in the assets? A. Yes.

Q. It was seven per cent cumulative preferred, was it not? [317] A. I think so.

(Testimony of Will E. Morrish.)

Q. It has paid no dividends since 1927, has it?

A. I could not state the date.

Q. You would have to know the date before you could arrive at the liquidating value of the common, wouldn't you?

A. I don't remember the date.

Mr. Naus: There is no question that it was 1927, is there?

Mr. Scampini: I will stipulate there is about \$10 of accumulated dividends; is that correct?

Mr. Naus: Roughly.

Q. Mr. Scampini and I have agreed, because there is no question, that there has been no dividend on the preferred since 1927. So, at the time of this deal here there were fourteen years' cumulative seven per cent dividend, and 7 times 14 is 98 per cent. There is no question about that. So wouldn't there be \$19.80 a share, roughly \$20 a share, that had to be assigned to that preferred instead of \$10 before you reached the value for the common stock?

A. Well, if it was a going concern, but I have based all of my figures on the liquidating value.

Q. Either as a going concern or as a liquidating concern the articles of incorporation that we have in evidence show that the preferred has the priority on liquidation, so it has a preference either way, can't you see, Mr. Morrish? So that instead of assigning \$10 a share to the preferred you must assign \$19.80 to the preferred as of the time of the deal in

(Testimony of Will E. Morrish.)

figuring out the liquidating value of the common stock.

Mr. Scampini: I will stipulate to that.

Mr. Naus: Just a moment, please.

A. That is right.

Q. Then can't you see, Mr. Morrish, instead of the common stock [318] having a liquidating value of \$2.80 at the time of this sale, it was worthless at the time of the sale?

A. The value was still there in the preferred stock owned by the Pacific Empire.

Q. Might I return to my question, and I am only pursuing it because on direct you said the value of \$2.80, liquidating value for the common. I want to test that. So I repeat my question. Can you now not see that if you use that method that at the time of the purchase deal the common stock was worthless?

A. No, I do not think it was worthless, because the company had had a long period of service in the community. It was entering into a period of good business, and there is always in addition to that a very substantial value placed on the control of any corporation.

Q. Is it or not the fact that using your method with respect to arriving at the liquidating value of the common stock, that at the time of the purchase deal the common stock was worthless?

A. I expressed myself that it was not worthless.

Q. I am speaking now for the purpose of liquidating. I will return to the future presently.

(Testimony of Will E. Morrish.)

A. I do not understand what you are driving at with regard to liquidation.

Q. I am only trying to follow up your suggestion of the liquidating value, Mr. Morrish. You took on direct examination what you call the liquidating value, the assets, the liabilities, this, that and the other thing to arrive at a value of \$2.80 per share of the common stock. Now, assuming that at the time of the purchase deal that instead of continuing in business the Merchants Ice & Cold Storage Company was liquidated out, and taking your value, isn't it a fact that at that time the common stock was worthless?

A. You mean if it was sold parcel by parcel, or if somebody came in and offered a price for it?

[319]

Q. I mean whatever you had in mind, Mr. Morrish, when in speaking of liquidating value on everything you assigning to the assets the value that you did.

A. I had in mind the sale, and I have testified to the value that I believe that the stock was worth on the liquidating sale.

Q. But now, as I have pointed out to you, on your direct examination you have only assigned \$10 a share to the preferred, and since I have provided you with additional information as to which there is no dispute between me and counsel, you must assign \$19.80 to preferred instead of \$10; that using your method, but correcting the figure as to pre-

(Testimony of Will E. Morrish.)

ferred, that that means on the liquidating value the common stock was worthless; isn't that the fact?

A. I have not figured that out.

Q. Would you do so, please, or can't we do it this way, by a question. Let me reframe it. Using your method of \$10 a share you finally end up with some figure of some \$200,000-odd and you divide 107,000 shares of common into that, don't you?

A. Well, if you value the preferred at \$20 a share there would be nothing left for the common stock; that is right.

Q. Well, now, let us take a further step. There would be nothing left for the common stock, and isn't it a fact that if you assign \$19.80 to the preferred there would not be enough to pay out the preferred in full?

A. No, I disagree with that.

Q. There are 41,615 shares. A. Yes.

Q. Now, assigning \$20 a share to that would be assigning \$832,300 to the preferred, wouldn't it?

A. Yes.

Q. There is not that much there, is there, after subtracting the bonds and notes and otherwise?

A. No, but in the settlement or liquidation there would have been a great many deductions that we could have made in these liabilities, and I [320] base this whole thing on liquidating value, and there would be value, in my judgment, enough to pay the preferred stockholders.

Q. Let me see if I understand that. Do you not

(Testimony of Will E. Morrish.)

mean by that that in order to pay out to preferred stockholders \$19.80 you would have to settle with your creditors or your notes payable creditors, your accounts payable creditors, at something less than a hundred per cent on the dollar?

A. I have deducted around \$450,000 from the assets as an allowance for those very things that you are now asking about.

Q. But to return to my question, I would like to see if I can get a direct answer to it. Is it not a fact that when you answered a while ago that in order to pay out even the preferred at a value of \$19.80 a share that you would have to pay your notes payable creditors, your account payable creditors, something less than 100 cents on the dollar in order to accomplish that?

A. You would have to do that if the value of the \$450,000 in question that I made to cover that was not included, yes.

Q. Well, now, was there ever any time prior to January 1, 1941, any time that you know of when any balance sheet of the Merchants Ice & Cold Storage Company could be looked at and from it be seen that the current assets amounted to more than the current liabilities; or to put it differently: So far as you know, isn't it the fact that the current liabilities position of Merchants Ice & Cold Storage Company has always been greater than its current assets position?

(Testimony of Will E. Morrish.)

A. For the two years I was there I believe that to be true.

Q. As you sit there now, you don't know of any year before January 1, 1940, in which it was not true?

A. I did not examine back beyond that time.

[321]

Q. Then you don't know, do you? A. No.

Q. That is not a healthy condition for a company, is it?

A. No, but the company was making improvement constantly in its credit position due to the fact that the depreciation was charged off each year. We were eliminating many of our accounts payable, old bills, that had been outstanding, and on the basis of the depreciation each year that company would have paid its accounts payable in the period of two years.

Q. All right, let me see if I understand that. You say, then, do you not, that the cash position of Merchants Ice & Cold Storage Company during the period that you were familiar with it depended upon the amount of depreciation written off each year? I will put it this way: The Merchants Ice & Cold Storage Company——

The Court: The testimony is that it was improving its position because of that write-off.

The Witness: Yes.

Mr. Naus: Improving its cash position.

The Court: Yes.

(Testimony of Will E. Morrish.)

Mr. Naus: Q. In other words, you were writing off \$72,000 or \$73,000 or thereabouts for depreciation? A. Yes.

Q. And that was the proper write-off, was it not? A. That is right.

Q. That was because the plant was wearing at that rate, was it not?

A. That is substantially so, but during the two years that I was there, there were a great many thousands of dollars put into the plant to keep it up to date, and in fact it was much improved during the two years rather than depreciated.

Q. Well, to come back to my question, depreciation is proper [322] to write off because of wearing of the plant; that is all there is to it, isn't it?

A. Yes.

Q. Take a year in which after depreciation the company broke just even, didn't make a dollar and didn't lose a dollar, then in such a situation the Merchants Ice & Cold Storage, while it neither lost nor made a dollar, would have available in cash say \$72,000 that would be depreciation write-off, wouldn't it? A. Yes.

Q. So your expectation of improvement in cash position came about simply during the wearing out of the plant?

A. I do not mean to say that they had that amount of cash on hand, because that cash was being used to pay off the liabilities.

Q. Now, you spoke as of the end of 1939, I think

(Testimony of Will E. Morrish.)

it was, or was it the end of 1940, about your expectation of improved business—were you speaking of 1940, at the end of 1940? A. Yes.

Q. You based that assumption upon what?

A. I based the assumption that the year 1941 was going to be a better year than 1940, an assumption that I used in the study of conditions all of the time; that is my business, to study conditions.

Q. Was that improvement of business due to your expectation of increased demands by the Government by reason of the adoption of the Selective Service Law? A. Yes.

Q. It was before Pearl Harbor? A. Yes.

Q. Was it based, then, on the transitory condition, so far as you could forecast?

A. I do not quite understand that last.

Q. What I mean to say by that is, Did you base it upon what now [323] would be called war conditions, or as of the early part of 1941, which would be the date of the draft law and the increased demands of the Government? You as a business man would look upon that as probably a transitory period, inasmuch as we hope the war will end at some time.

A. Yes, but our general position was improving in addition to that.

Q. In the two years that you were there and to which you are addressing your testimony, what was the aggregate for each of those years of the gross

(Testimony of Will E. Morrish.)

sales or gross revenue of the Merchants Ice & Cold Storage Company?

A. I have not those figures before me.

The Court: If you have them available, get them.

Mr. Naus: Q. You have what two years—1939 and 1940?

A. Yes.

Q. According to the books, records, etc., the aggregate gross sales or gross revenue from storage, ice and the like for 1939 was in reported figures \$386,000 and for 1940 \$371,000. Do you have that in mind now?

A. I do not remember the figures, but I remember that 1940 was a little less than 1939 due to a very peculiar condition that existed in regard to the pear crop.

Q. Well, all I know about the figures is what we get from the audit report and the books, about which we have no controversy here, Mr. Morrish. Now, what did you forecast the gross business of 1941 was likely to be at the time of the Bercut deal?

A. I never made any forecast, in figures.

Q. Well, as to whether the business was going to continue for long years, or losses in a year or two or profit—doesn't that depend largely upon the amount of increased business they are going to do?

A. Yes.

Q. And particularly in this type of business

(Testimony of Will E. Morrish.)

where the rates [324] are regulated by a public body? A. Yes.

Q. Making your forecast for 1941, what did you think it was going to do by way of operating results for the year 1941? What did you have in mind at the time of the Bercut deal in January, 1941, that the company was likely to do for the year 1941?

A. I did not give any consideration to it at that time. My ideas on that were formed in the latter part of 1940 when we were supposed to continue as we had in 1941.

Q. At the end of 1940 did you expect the company to have another year end in a loss or end in some profit? A. At the end of 1940?

Q. At the end of 1940 did you figure 1941 would end up with a loss or some profit?

A. With a profit.

Q. How much did you anticipate?

A. That would be guessing.

Q. Well, I agree with you there, but apparently your estimated value was based on some guessing. What at the end of 1940 did you guess as to 1941?

A. It was pretty generally agreed by Mr. Arnold and myself during the latter part of 1940, with our several new accounts, that we had on the books, and with the prospect for the fruit situation, etc., we would have a much better year in 1941.

Q. You spoke of there not being pressure from the Pacific National Bank. Can you or not as a former director and chairman of the board tell me

(Testimony of Will E. Morrish.)

whether or not during 1940 the notes payable to the Pacific National Bank were secured by a pledge of accounts receivable of the Merchants Ice & Cold Storage Company?

A. Some of them were, yes. You are talking of the Merchants Ice & Cold Storage Company?

Q. Yes. A. Yes.

Q. Can you or not tell me whether during 1940 there was a pledge [325] of what was known as the ice contract, that is to say, all of the monies to be received for a year thereafter from the production of ice?

A. What do you mean, a pledge to the bank?

Q. Yes. A. I can't answer that.

Q. At the end of 1940 do you know what the current liabilities position of the Merchants Ice & Cold Storage was?

A. I could not tell you unless I had the figures.

Mr. Naus: I do not think we have put in that balance sheet. I have that.

Mr. Scampini: You can put it in now.

Mr. Naus: I offer the balance sheet of Merchants Ice & Cold Storage Company as of December 31, 1940.

The Court: It may be admitted and marked.

(The balance sheet was marked "Defendants' Exhibit G.")

(Testimony of Will E. Morrish.)

DEFENDANTS' EXHIBIT G

Merchants Ice & Cold Storage Company

BALANCE SHEET AS OF DECEMBER 31, 1940

Assets		Month of December
Plant, Property and Equipment:		
Land	\$	865,608.55
Buildings, machinery and equipment.....		2,284,365.54
Less reserve for depreciation.....		1,336,625.18
		<hr/> 947,740.36
Plant property and equipment.....		<hr/> 1,813,348.91
Acme Ice Cream Co.:		
Land and Buildings.....		<hr/> 28,185.53
Investments in Securities.....		<hr/> 26,437.40
Current Assets:		
Cash		2,918.93
Notes receivable		13,604.15
Accounts receivable		134,219.78
		<hr/> 150,742.86
Less reserve for doubtful accounts.....		26,500.00
Total Current Assets.....		<hr/> 124,242.86
Due from Globe Brewing Co.....		27,995.68
Less reserve		15,000.00
Total Due from Globe Brewing Co.....		<hr/> 12,995.68

(Testimony of Will E. Morrish.)

Deferred Charges:

Unamortized bond discount and expense.....	\$ 28,230.76
Commission on sale of Preferred stock.....	11,063.57
Prepaid taxes	11,443.60
Prepaid insurance	3,576.67

Total Deferred Charges.....	54,314.60
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Total	2,059,524.98
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Liabilities

Month of
December

First Mortgage 6½% Serial Gold Bonds.....	\$ 659,500.00
Mortgage Payable Other Property.....	11,300.00

Current Liabilities:

Notes payable, banks.....	98,199.58
Notes payable, other.....	5,771.89
Contracts payable	1,090.00
Accounts payable	30,462.24
Taxes payable, City and County.....	25,704.73
Accrued unemployment reserve for payroll taxes	4,271.54
Accrued Social Security taxes.....	656.74
Accrued wages	3,958.34
Accrued bond interest.....	10,716.87
Accrued interest payable.....	2,331.99
Accrued Federal Income Taxes.....	1,912.50
Federal Income Tax assessment.....	1,713.59
Due on repurchase agreement for our own Preferred Capital stock.....	750.00

Total Current Liabilities.....	187,540.01
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Rent Received in Advance.....	2,048.47
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(Testimony of Will E. Morrish.)

Capital Stock:

Preferred 7% Cumulative 41,615 shares	
outstanding	\$ 416,150.00
Common stock without par value, 107,180	
shares outstanding	999,575.00
	<hr/>
Total Capital Stock.....	1,415,725.00
	<hr/>
Surplus as of March 31, 1940.....	216,588.50*
	<hr/>
Total	2,059,524.98
	<hr/>

*Denotes red figures.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Defts. Ex. No. G. Filed 5-6-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

Mr. Naus: Q. I show you Defendants' Exhibit G and ask you to accept that as the balance sheet of the Merchants Ice & Cold Storage Company as of December 31, 1940, because I do not think there is any controversy between the parties that it is. Now, looking at that balance sheet as of December 31, 1940, when you look at the current liabilities as against current assets, wasn't the Merchants Ice & Cold Storage Company a little bit sick?

Mr. Scampini: We will stipulate it was a little bit sick. It had a cold.

Mr. Naus: Will you stipulate it was quite sick?

The Court: Will take a recess and let the witness have an opportunity to look it over.

(After recess:)

(Testimony of Will E. Morrish.)

Mr. Naus: Q. Before recess, Mr. Morrish, we were talking with respect to the condition of the health of the Merchants Ice [326] & Cold Storage Company at the end of 1940. Having in mind its current liabilities position and current assets position, what can you tell us about that now?

A. I have never seen this statement before, but reading from the statement, the total current assets are \$124,000 and the total current liabilities are \$187,000, but that is not in my judgment a bad condition, because many a company that has been in that condition has been able to work out of it easy.

Q. It is generally worked out by getting more cash, isn't it?

A. The difference between them is \$62,063 and one year of depreciation converted into cash for that year would have taken care of it.

Q. Would you expect the creditors to wait for a year's depreciation before they were paid?

A. Many of these liabilities could have been carried on.

Q. Now, how much cash did it have on hand on December 31, 1940? A. \$2,900.

Q. Did it or not have some \$20,000 of taxes delinquent about that time?

A. Well, I couldn't answer that.

Q. Can you or not tell me whether or not in March, 1941, some \$21,000-odd under the bond indenture would have to be deposited to pay the interest on the bonds?

(Testimony of Will E. Morrish.)

A. Well, there were bond requirements each year to be paid.

Q. Where, as of December 31, 1940, with the current liabilities one and a half times the assets, was the \$21,000 of cash coming from to pay the interest early in 1941?

A. Well, this statement is as of December 31, 1940, and you said these bond requirements were in March or April.

Q. I think in April, but they were required to be placed in the hands of the trustee thirty days ahead.

A. They had [327] accounts receivable of \$134,000 and they only owed—I don't know from the statement; I could not say how much they owed on accounts receivable.

Q. You know, don't you, that the accounts receivable, the majority of them, all that were of any consequence were already soaked with the Pacific National Bank?

A. No, it does not show that. It shows that the notes payable at the bank were around \$98,000, and there might have been, as you suggested this morning, a contract of collateral on that loan.

Q. Can you or not tell me whether as of December 31, 1940, the Merchants Ice & Cold Storage Company was getting in fairly desperate need for cash to continue in business?

A. Yes, they needed cash.

Q. I will repeat my question: Can you or not

(Testimony of Will E. Morrish.)

tell me whether or not at the end of 1940 they were desperately in need of a substantial amount of cash?

A. Not any more than they had been in the past.

Q. You mean it was rather customary or habitual for the Merchants Ice & Cold Storage Company to be in desperate need of ready cash?

A. They were always short of cash.

Q. Now, this loss that you spoke of in 1940, that was with Bennett & Layton, was it not?

A. I believe it was.

Q. You spoke of trust receipts; you meant warehouse receipts, didn't you. I understood your direct examination to state trust receipts, but you meant warehouse receipts?

A. Yes.

Q. I just wanted to clear it up. Those were negotiable warehouse receipts which the Merchants Ice & Cold Storage Company, what might be called a public warehouse, put out to the public?

A. Yes.

Q. The loss that you speak of was that the Bank of America was [328] claiming approximately \$40,000 from the Merchants Ice & Cold Storage Company because it as an innocent holder of value to the extent of \$40,000 had put out money on Merchants Ice & Cold Storage butter receipts, but it turned out there was no butter; is that what you mean?

A. I think that is right.

Mr. Naus: I think that is all.

(Testimony of Will E. Morrish.)

Redirect Examination

Mr. Scampini: Q. Have you had an opportunity since the recess to examine the statements of Merchants Ice & Cold Storage Company for the years not only of 1940 but 1941 and 1942?

A. Yes, I looked at them during the recess.

Q. Have you as a result of your study of those operating statements and also the balance sheets for those two years 1941 and 1942 arrived at any opinion with respect to whether or not the reasonable value of the block of shares of the Merchants Ice & Cold Storage Company owned by Pacific Empire Holdings, Inc.—that is to say, approximately 65,000 shares of common and 12,000 shares of preferred—were of higher value in 1942 than they were in 1941?

A. I had only a short time to look, to just scan these statements; I had no time to give an analysis, but on the figures that the statements show and based on the figures that I had in the statement that I submitted here they show very material improvement, and that improvement was about what we would have expected, under the analysis that I discussed.

Mr. Scampini: No further questions.

Recross Examination

Mr. Naus: Q. In 1940 the gross revenue, the gross business of Merchants Ice & Cold Storage Company was something under \$400,000; you recall that? A. Yes.

(Testimony of Will E. Morrish.)

Q. The profit in 1942, you observe, do you not, from looking at the statement was based on gross revenue or gross sales in [329] excess of \$800,000 for that year? A. Yes.

Q. At the end of 1940 did you look into and see that in 1942 the Merchants Ice & Cold Storage Company was going to do more than twice as much gross business as they had in previous years?

A. Based on the war situation it so looked, yes.

Q. You expected it would more than double?

A. We certainly expected it to double in the war situation. It is a very important service.

Q. Mr. Morrish, you and I and perhaps the Judge know enough to know what happened in the former war. There was a great deal of business, particularly in time of war. A. Yes.

Q. That is what you mean? A. Yes.

Q. Then do you ascribe the good business done for the calendar year 1942 to a condition of war, that transitory condition, primarily, if not entirely?

A. Well, not entirely. I think that anyone going in there with any executive ability could have improved very materially the condition of that company, and I judged that Mr. Bercut had ability along that line. However, the main part of the increase was due to war condition and not to business ability.

Q. Let us take a step further. Having in mind also that these rates down here are regulated by a public body and they are not to be up and down at

(Testimony of Will E. Morrish.)

will, without assistance of war business would you forecast that the Merchants Ice & Cold Storage Company would go back to the doldrums?

A. Well, I would forecast in my judgment there would be a period of several years of good times, at which time the bond issue of the company could be paid in full, and that the company would then be able to weather any condition that might arise.

Q. Then you would expect as of January, 1941, that any possible [330] purchaser of the common and preferred stock of Merchants Ice & Cold Storage Company would pay a fair price, based on your personal view of what would happen in 1943, 1944 and 1945?

A. I think he would have made a fair purchase.

Further Redirect Examination

Mr. Scampini: Q. At what price would you think he would have made a fair purchase?

A. I would stay with my original price.

Q. What was that again?

A. My original statement was around \$2.80 a share, approximately.

Q. For the common? A. For the common.

Q. And \$10 a share for the preferred, is that right? A. Yes.

Q. In other words, you are now stating for the purpose of the record in your opinion anyone who paid the equivalent of \$2.80 a share for 65,000

(Testimony of Will E. Morrish.)

shares of common and \$10 a share for 12,000 shares of preferred from the Pacific Empire Holdings on January 8, 1941, would have paid a fair price?

A. Yes.

Further Recross Examination

Mr. Naus: Q. What is the common stock being bought and sold for today?

A. I have not that information.

Q. What is the highest the common has ever been bought and sold for at any time in the ten years ending today?

A. I cannot answer that, but I think that sales of stock on the market mean very little as to actual value.

Q. You mean that anyone in the last couple of years, any time during the last couple of years, who held any common and sold it for not more than 50 cents was simply guilty of business stupidity?

A. That is a rather strong statement.

Q. I would make it stronger if I could.

A. I would say that I would not have sold any stock that I owned for 50 cents [331] a share.

Mr. Naus: Well, that does not quite answer my question, but I will pass it.

Mr. Scampini: No further questions.

Mr. Pardini: Q. In other words, if you had one share of stock out of 106,000 outstanding and you did not have the control, you might sell it at 50 cents?

A. I might give it away then.

(Testimony of Will E. Morrish.)

Q. If you had control you would put a different value on it? A. That is right.

Mr. Pardini: If your Honor please, during the first day of trial this week in connection with reading the deposition of Miss Keener I was asked as to her relationship with Mr. Arnold. I sent him a telegram, "Who, when and where did you marry?" and received an answer, "Answering your wire, please know that since Mrs. Arnold's death February 15, 1941, I did not marry anyone any place. This is for your information in connection with pending litigation."

Mr. Naus: I ask that the telegrams be marked for identification.

The Court: They may be marked.

Mr. Brownstone: I think I might make a statement that I can produce a letter under the signature of the present wife in which she states that she is his wife.

(The telegrams were marked "Defendants' Exhibit H for Identification.")

No. 10550

United States ✓
Circuit Court of Appeals

For the Ninth Circuit.

THOMAS H. WINGATE, as receiver in equity for
Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware,
Appellant,

vs.

PETER BERGUT, HENRI BERGUT, M. MAFFEI and L. R. ARNOLD,
Appellee.

Transcript of Record
In Two Volumes

VOLUME II
Pages 501 to 982

Upon Appeal from the District Court of the
United States for the Northern District
of California, Southern Division.

FILED

DEC 17 1943

PAUL P. O'BRIEN,
Clerk

No. 10550

United States
Circuit Court of Appeals

For the Ninth Circuit.

THOMAS H. WINGATE, as receiver in equity for
Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware,

Appellant,

VS.

PETER BERCUT, HENRI BERCUT, M. MAFFEI and L. R. ARNOLD,

Appellee.

Transcript of Record
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Pages 501 to 982

**Upon Appeal from the District Court of the
United States for the Northern District
of California, Southern Division.**

H. R. GAITHER,

called for plaintiff; sworn. [332]

Direct Examination

Mr. Scampini: Q. Mr. Gaither, your address is where? A. 333 Montgomery Street.

Q. What is your profession or business?

A. Banking.

Q. Are you president of the Pacific National Bank of San Francisco? A. I am.

Q. How long have you been its president?

A. Since about 1929.

Q. Is it not a fact that on or about 1932 or 1933 the City National Bank of San Francisco was merged with the Pacific National Bank of San Francisco? A. The stock was purchased.

Q. And shortly thereafter Pacific Empire Corporation and Pacific Empire Holdings as a result of the merger became substantial holders of the outstanding stock of the Pacific National Bank of San Francisco; is that correct? A. Yes.

Q. And Mr. Maffei and Mr. Arnold became directors of the bank, is that right?

A. That is right.

Q. Is it true or not that sometime in 1940 Mr. Peter Bercut became a director in your bank?

A. Yes.

Q. Did he succeed Mr. Arnold as a director?

A. Not necessarily Mr. Arnold. We put Mr. Bercut on. Mr. Arnold had been out previous to that time.

(Testimony of H. R. Gaither.)

Q. Then Mr. Maffei discontinued?

A. That is right.

Q. Now, for a period of years the bank carried some very heavy loans for Pacific Empire Holdings and Pacific Empire Corporation, did it not?

A. Yes.

Q. Going back to the days of the merger of the City National Bank with the Pacific National Bank, is that correct? A. Yes.

Q. Can you state whether those loans were secured or unsecured—whether your records show?

A. They do.

Q. Were they secured?

A. They were secured. [333]

Q. Were they amply secured?

A. We had ample security.

Q. Now, sometime in 1940 or thereabouts did the Pacific National Bank of San Francisco carry any loans for Merchants Ice & Cold Storage Company? A. Yes.

Q. Do your records indicate approximately how much those loans were at the end of 1940?

A. They do.

Q. Will you please state how much those loans were?

A. On January 1, 1941, the Merchants Ice & Cold Storage Company owed us \$21,690.01. We had discounted bills receivable of \$43,726.20, and the Merchants had a contingent liability, covering paper notes for their own customers of \$53,598.11.

(Testimony of H. R. Gaither.)

Q. As to the item which you have just last read, is it not true that that represents commercial paper taken by Merchants Ice & Cold Storage Company from its customers and discounted at the bank?

A. Yes.

Q. And was it good commercial paper?

A. It was.

Q. Was it a good loan for the bank?

A. It was.

Q. Take the notes payable to the bank by Merchants Ice & Cold Storage Company of approximately \$21,000.

A. That also was amply secured by an ice contract.

Q. By an assignment of an ice contract?

A. Yes.

Q. Did you consider it to be a good loan?

A. Yes, I did.

Q. There were also some accounts receivable?

A. Yes, \$42,726.20.

Q. Secured by accounts receivable current how much?

A. I could not give you the exact figure, but I think it was a margin of *least* 10 or 15—I know it was 10; it might have been 15.

Q. Did you consider that to be a good loan?

A. I did.

Q. Is it or is it not true that during the latter part of 1940 Pacific National Bank of San Francisco criticized any of the loans [334] of the Pacific

(Testimony of H. R. Gaither.)

Empire Holding Company or Pacific Empire Corporation?

A. The Pacific Empire Holdings loan and Pacific Empire Corporation were criticized because the main security was our own bank stock.

Q. Did you consider that loan to be a good loan?

A. I did.

Q. Who criticized that loan?

A. The National Bank Examiners.

Q. Because of some statutory condition?

A. On the statutory condition that it was secured directly by our own bank stock.

Q. Was there any criticism of any Merchants Ice & Cold Storage Company loan?

A. The only criticism of the Merchants Ice & Cold Storage Company was back in 1939 when the National Department ruled that when you gave the limit of any one loan to a corporation you had to include in that loan the obligation of the corporation where the holding company had more than fifty per cent of the outstanding stock.

Q. Was that criticism cleared up subsequently?

A. It was.

Q. Now, as a matter of fact, the loan of the Pacific Empire Corporation was subsequently repaid in full by the sale of Pacific National Bank stock?

A. Correct.

Q. Did Pacific National Bank of San Francisco, to your knowledge, or you as president ever bring any pressure to bear upon Merchants Ice &

(Testimony of H. R. Gaither.)

Cold Storage Company, Pacific Empire Holdings or Pacific Empire Corporation, or Mr. Arnold, to pay off this loan of the Merchants Ice & Cold Storage Company?

A. The only thing we said was that we had reduced the line of their credit on account of the National Bank ruling on it.

Q. Did you ever bring any pressure on them toward disposition of the Merchants Ice & Cold Storage stock in order to do that?

A. No.

Mr. Scampini: That is all. Take the witness.

[335]

Cross Examination

Mr. Naus: Q. Mr. Gaither, you spoke of an item of \$21,690 secured by an ice contract?

A. Yes.

Q. When was that security given?

A. We had that loan at various times, at one time back in December of 1939, and it was paid up, and then we took it back again, on October 24, 1940.

Q. Now, that ice contract, would you describe it a little more for his Honor? What do you mean by ice contract?

A. As I understand, it was an agreement between the Merchants Ice & Cold Storage Company and the National Ice & Cold Storage Company whereby they formed a delivery ice company.

Q. The City Ice Delivery Company?

(Testimony of H. R. Gaither.)

A. The City Ice Delivery Company. What percentage of interest the Merchants Ice & Cold Storage Company and what interest the National had, I don't know.

Q. But you loaned on the security of the contract? A. Yes.

Q. For the making and the delivery of ice for a period of about a year?

A. Probably two years.

Q. That was ice to be thereafter made in the future? A. That is correct.

Q. That is to say, it depended on the ability of the Merchants Ice & Cold Storage Company to pay its power bills and wages, taxes, and so on, and keep making ice for the contract period?

A. I think the company had other assets besides that.

Q. Now, what was the interest rate on that last loan there ?

A. I cannot answer that, but I think it was six per cent.

Q. Couldn't it have been as high as eight per cent?

A. I can verify it for you. I have some records here, if you will permit me to look at them.

Q. As of January 1, 1941, the date that you gave, what was the interest rate as of that time?

A. Excuse me if I am a [336] little slow on picking it out. I do not have much to do with this work.

(Testimony of H. R. Gaither.)

The Court: There are not many bank presidents who can do what you are doing now.

Mr. Naus: I am informed by the accounting department of the Merchants Ice & Cold Storage Company that they were paying, as I understand it, eight per cent. There could be a mistake. I don't know what the fact is.

A. I have not got that record here; that one is missing, but I think it was six per cent. I could verify it.

Q. I will pass that. On the bills receivable \$42,726 that you discounted, what was the rate of discount?

A. Either seven or eight per cent.

Q. More likely eight than seven?

A. Probably so.

Q. On the contingent paper what was the rate of discount?

A. Six per cent.

Q. By the way, you recall, do you not, along about January 8, 1941, the sale of the Merchants Ice & Cold Storage stock to Mr. Bercut?

A. Yes.

Q. Subsequent to that sale, state whether or not you reduced the interest rate charged the Merchants Ice & Cold Storage Company.

A. After the sale we did. Mr. Bercut guaranteed the loan.

Q. You reduced it to what rate—what per cent?

A. I can tell you that in a minute. Yes.

Q. In other words, you reduced the interest from whatever rate it was to four per cent simply be-

(Testimony of H. R. Gaither.)

cause Mr. Bercut was in and gave you his personal guarantee? A. Yes.

Q. What was the maximum amount you extended those credits at any time since he got in there?

A. \$115,000, we made a loan, and I think the guarantee was \$100,000. [337]

Q. In other words, after taking the company over Mr. Bercut gave his personal guarantee, which the bank accepted? A. It did.

Q. Up to a maximum of \$100,000, and they were perfectly willing to accept that guarantee and reduce the interest rate? A. That is right.

Q. When you extended that credit to Merchants Ice & Cold Storage Company you were doing it on the strength of Mr. Bercut's personal guarantee?

A. Yes.

Q. He had filed a financial statement with you of his condition? A. Yes.

Q. Will you state what his financial net worth purported to be, as you recall?

A. It was in the rough—I couldn't give you the exact figures—approximately a million dollars.

Q. As I understand, you were perfectly willing to extend any reasonable amount of credit on the basis of his financial report showing a net worth of one million dollars? A. Yes.

Q. In other words, Mr. Bercut's personal credit was substantially better than the credit of the Merchants Ice & Cold Storage Company, was it not?

A. Yes.

(Testimony of H. R. Gaither.)

Redirect Examination

Mr. Scampini: Q. Had you ever refused any reasonable extension of credit to the Merchants Ice & Cold Storage at any time?

A. Not as long as they had security.

Q. You would not, of course, refuse it if it had been requested on the basis of any reasonable security; is that true? A. Yes.

Q. Whether on Mr. Bercut's individual security or Merchants Ice & Cold Storage security, or anybody else's? A. That is right.

Mr. Scampini: That is all. [338]

Mr. Naus: I have been informed I was in error on the loan on the ice contract. That was six per cent.

WALTER O. H. PLAGEMANN,

called for plaintiff; sworn.

Direct Examination

Mr. Scampini: Q. Mr. Plagemann, your full name is Walter O. Plagemann?

A. Walter O. H. Plagemann.

Q. I have known you for some years?

A. Yes, you have.

Q. You have been secretary of the Merchants Ice & Cold Storage Company for many years, haven't you? A. Yes, I have.

Q. How many years have you been secretary?

(Testimony of Walter O. H. Plagemann.)

A. I have been there as secretary—I don't know exactly—I have been twenty-five years with the company.

Q. You were secretary when I was a director of your company? A. Yes.

Q. You were secretary under Mr. Sherman's regime, were you not? A. Yes.

Q. And under Mr. Stratton's and Mr. Vincent's regime? A. Correct.

Q. And under Mr. Arnold's? A. Yes.

Q. So you know the history of this company pretty well, don't you? A. Yes.

Q. How far back does it go?

A. In 1917 I started in as a clerk and gradually worked myself up to be assistant secretary and finally secretary-treasurer. After a few years, after four or five years, I was assistant secretary, and in 1929 or 1930 I became secretary.

Q. Mr. Plagemann, during the years 1917 clear up to 1928, when the depression started in, in 1929, the Merchants Ice & Cold [339] Storage Company had some good earning seasons?

A. In previous years?

Q. Yes. A. Yes.

Q. It always earned money?

A. Not always.

Q. When did it not earn money?

A. Well, in 1924 the new building was put up, and in 1927 it gradually dropped down.

(Testimony of Walter O. H. Plagemann.)

Q. In 1929, of course, the depression set in all over the United States? A. Yes.

Q. Isn't it true that during the period from 1929 down to 1935 the entire industry as a whole, and by that I mean the cold storage and ice industry, throughout the United States, had practically the same down trend in business activity as was suffered by the Merchants Ice & Cold Storage Company?

A. All over the United States there was a downward trend.

Q. That is true of its competitor, the National Ice & Cold Storage Company?

A. Everybody suffered.

Q. The National Ice & Cold Storage Company defaulted in their bond issue?

A. As far as I recall. I never studied it to see, but I understand it did.

Q. Did the Merchants Ice & Cold Storage Company through all of this period of the depression ever default on its bond issue?

A. Not until the reorganization was put through.

Q. Was that a default?

A. It was an indication, in my opinion, that something had to be done.

Q. The bondholders gave it an extension on the payment of the principal, didn't they?

A. Five years.

Q. Did it ever fail to make the payment of interest on the outstanding bonds from the very inception?

(Testimony of Walter O. H. Plagemann.)

A. Not the interest; the interest was not defaulted at any time provided for until the year the reorganization plan was put into [340] effect.

Q. Then they continued to pay interest during the moratorium? A. Yes.

Q. The bond issue was originally \$1,200,000?

A. Yes.

Q. It is down to a little more than \$600,000?

A. Yes.

Q. All of that has been paid out of earnings of the company, hasn't it?

A. Well, whether you would call it earnings of the company or how you would interpret it, I don't know.

Q. You have not had any new capital invested?

A. No.

Q. At any time since the bond issue?

A. No.

Q. Clear down to the present time?

A. No.

Q. And the company paid off its obligations, is that right? A. Yes.

Q. Have you ever closed down business?

A. No.

Q. Have you continued to operate the business ever since then? A. Continued right along.

Q. Sometimes, of course, you had some difficulty in meeting your obligations? A. Correct.

Q. But you were never closed down by any of your creditors, were you?

(Testimony of Walter O. H. Plagemann.)

A. Well, pretty close sometimes.

Q. You managed to survive? A. Yes.

Q. You managed to survive better than the National Ice & Cold Storage Company?

A. I don't know about the condition of the National Ice & Cold Storage Company. I know we had quite a problem with the Merchants Ice.

Q. As a matter of fact, Mr. Plagemann, under the regime of Stratton and Vincent and Mr. Sherman and Mr. Arnold there was some very poor management, was there not, in your opinion?

A. Yes.

Q. There were a lot of shenanigans in the company, were there not? [341]

A. They thought money was growing on trees.

Q. You recall the time that Mr. Scampini was up at the Merchants Ice & Cold Storage Company and called Mr. Sherman a crook, don't you? Weren't you there?

The Court: I don't know how much that is going to help us here, hearing any remarks like that.

Mr. Scampini: Q. Now, Mr. Plagemann, have you with you today the appraisal of the properties, of the land and buildings, by the American Appraisal Company of 1927? A. I have.

Q. You have delivered to me three volumes.

A. The first book is the summary.

Q. No. 1? A. That is No. 1.

Q. This is the summary, is that right?

A. That is the summary.

Mr. Scampini: I will offer this in evidence as

(Testimony of Walter O. H. Plagemann.)

the summary in lieu of two enormous volumes as the appraisal of the company's land and real estate in 1927, and ask that it be marked plaintiff's exhibit in order.

The Court: It may be admitted and marked.

(The volume was marked "Plaintiff's Exhibit 36.")

Mr. Scampini: Q. Now, in 1936 there was a report or an appraisal made of the company to be used in the reorganization proceeding by an engineer by the name of J. D. Galloway?

A. Yes.

Q. Have you that with you? A. Yes.

Mr. Naus: I do not think that appraisal properly describes this; it is more like an engineering analysis. I do not think it is an appraisal.

Mr. Scampini: It is an engineering appraisal by J. D. Galloway, civil engineer, under date of 1936, and it was delivered to the company, was it not, Mr. Plagemann, and used by [342] the company in connection with its reorganization proceeding under 77b before this court for the purpose of amending the bond indenture and getting the postponement of the bond payments; is that right?

A. Yes.

Mr. Scampini: I offer this in evidence as plaintiff's exhibit next in order for what it may be worth to the Court.

The Court: It may be admitted and marked.

(The document was marked "Plaintiff's Exhibit 37.")

(Testimony of Walter O. H. Plagemann.)

Mr. Scampini: Q. Now, Mr. Plagemann, as secretary of the company are you familiar with the transactions wherein and whereby the Allied Products Company was indebted to Merchants Ice & Cold Storage Company for a certain amount of money, and sometime in the year 1941 was that account paid by Allied Products Company by delivering to the company 500 shares of stock of Frostcraft Corporation?

A. It was delivered to Mr. Peter and Henri Bercut.

Q. What happened to the account?

A. The account was paid to the Merchants Ice & Cold Storage Company after Peter and Henri Bercut had delivered their check to the Allied Products Company.

Q. Then Allied Products Company delivered the check to Merchants Ice & Cold Storage Company?

A. Which was credited to accounts receivable.

Q. Then this block of stock, which I think aggregated 500 shares, was taken by you to Frostercraft Corporation, was it not?

A. As a representative of Peter and Henri Bercut.

Q. What did they say to you when they delivered it?

A. I asked them to transfer it into the name of Henri and Peter Bercut.

Q. Have you got custody of or are you familiar with an account showing advances to L. R. Arnold

(Testimony of Walter O. H. Plagemann.)

by the Merchants Ice & Cold [343] Storage Company? Have you got it with you?

A. I have.

Q. May I see it, please? A. Yes.

Q. Now, there have been handed to me certain ledger sheets entitled "Account No. 111, Lloyd Richard Arnold, Advances." Will you state what they are, Mr. Plagemann?

A. In July, 1939, there was an advance made to Mr. Arnold on account of his salary; prior to July 31, 1939, Mr. Arnold had drawn \$1,936.76.

Q. Did he continue to draw down money from the Merchants Ice & Cold Storage Company?

A. This money was transferred out of advance and given credit to him for his salary—this money that he had spent or advanced was wiped out by a journal entry, July 31, and charged up to his office salary.

Q. Thereafter did he continue to draw down any further advances?

A. During 1939 that was wiped out by an entry of December 31, 1939, crediting Mr. Arnold and charging Joseph McInerney.

Q. How much did he draw down from that?

A. \$1,156.44.

Q. What do you mean by charging Joseph McInerney? A. On the orders of Mr. Arnold.

Q. He told you to open an account receivable as due you from Joseph McInerney and you cleared up that account, is that right?

(Testimony of Walter O. H. Plagemann.)

A. Cleared up Mr. Arnold's advances. I cleared Mr. Arnold's account and charged Joseph McInerney.

Q. Did Mr. Joseph McInerney have any account?

A. That was on the orders of Mr. Arnold, president of the Merchants Ice & Cold Storage Company.

Q. Thereafter did he continue to draw down any money?

A. He did in 1940. He did not receive his salary check at one time, but he drew it as he wanted the money, and I charged it to his salary. Mr. Arnold gave me a check on December 31, 1940 [344] for \$1,562.80 all together with a credit discount for expenses which he had incurred, and he gave me vouchers for it, which were O.K. and audited by Mr. Heer. That cleaned up that account.

Q. How much was that account at that time? How much did he owe?

A. That was \$1,562.80.

The Court: If I follow the testimony, was that on the salary?

Mr. Scampini: Q. Was that an advance to him on his salary?

A. An advance of money he drew; his salary was charged against that, and he still owed \$1,562.80 after his salary was taken out of it.

Q. How was that paid off?

A. A check was given to me on December 31, 1940, and on January 1st or 2nd Mr. Arnold took

(Testimony of Walter O. H. Plagemann.)

that check back and charged it to the holding company.

Q. In other words, he gave you his check and took the check back and charged it to the holding company? A. Took it out again.

Q. Have you got the account in there for the holding company?

A. This is the 1939 suspense account of the holding company.

Q. What is that?

A. Money that was paid in advance to the holding company was put in this suspense account.

Q. During the year 1939 was there any money advanced to the holding company?

A. The balance at the end of 1939 was \$35,949.29.

Q. Owing to whom?

A. That was advanced to the holding company.

Q. Now, at the end of 1938 did the holding company owe any money to Merchants Ice & Cold Storage Company?

A. In 1938—there was no suspense account in 1938.

Q. Let us put it another way: At the end of 1938 did Merchants [345] Ice & Cold Storage Company owe money to the Pacific Empire Holdings?

A. In 1938 I am informed they owed the Pacific National Bank under the ice contract.

Q. Did they owe any money to the Pacific Empire, Inc.?

A. For money borrowed on the ice contract.

(Testimony of Walter O. H. Plagemann.)

Q. Can you state whether or not any of these advances which your records seem to indicate were money owing by the Pacific Empire Holdings were advances made by cash or check? A. Checks.

Q. To whom?

A. Made out to the Pacific Empire Holdings.

Q. Have you got any of those checks?

A. I have those checks.

Q. How much do those checks aggregate at the end of 1939?

A. \$46,999.29 were the charges against that account.

Q. What do you mean by charges?

A. That is the checks that were charged to that account less the \$11,050 which was entered at different times crediting different ledger accounts that we had in the general ledger pertaining to the holding company. For example, on January 31—pardon me; I have to change my testimony. I was looking at the 1940 ledger sheet. I will have to change that. In 1939 there was a debit balance of \$32,899.24 in this suspense account. It shows that they owed that. There was a journal entry clearing out that account.

Q. How was it cleared up?

The Court: What does the journal entry reflect?

The Witness: It reflects the clearing out of that account and charging in other accounts to dispose of this balance.

Mr. Scampini: Q. Was it ever actually paid off, this balance, or was it just shifted around?

A. It was shifted around from place to place. This was never paid up. It is still owing. [346]

(Testimony of Walter O. H. Plagemann.)

Q. I notice here there are a lot of items, 250, 250, 200, 200. What are those checks for?

A. Checks that were delivered to the holding company in the holding company's name.

Q. Did you deliver checks to Mr. Arnold or Mr. Maffei or Mr. Heer and charge them to the holding company?

A. No, they were always made out to the Pacific Holdings Company. At times Mr. Heer would receive a check in his own name and it was charged to salary. Mr. Maffei would receive his check and that was charged to old notes of 1935 and 1936 of the holding company.

Q. Whenever those individuals wanted any money they would go down to the Merchants Ice & Cold Storage Company and help themselves and shift the books around and charge it to this, that or the other? A. Yes.

Q. That is the way they ran the Merchants Ice & Cold Storage Company? A. Yes.

Mr. Scampini: That is all.

Mr. Naus: No questions.

The Court: We will take a recess now until two p. m.

(Thereupon a recess was taken until 2:00 p.m this date.) [347]

Thursday, May 6, 1943—2:00 P. M.

Mr. Scampini: Is there any objection to having admitted in evidence the exhibits which are marked for identification?

(Testimony of Walter O. H. Plagemann.)

Mr. Naus: I would like to know what particular ones they are.

Mr. Scampini: I now offer in evidence, may it please the Court, a copy of the auditor's report made as of June 4, 1940, for the period ending December 31, 1939, prepared by John F. Forbes & Company, which was examined by counsel on the other side during last evening.

Mr. Naus: No objection.

The Court: It may be admitted and marked.

PLAINTIFF'S EXHIBIT No. 38

JOHN F. FORBES & COMPANY

Certified Public *Accounts*

Crocker Building

San Francisco

June 4, 1940

Merchants Ice and Cold Storage Company

Battery and Lombard Streets

San Francisco, California

Dear Sirs:

We have examined the balance sheet of the Merchants Ice and Cold Storage Company as of December 31, 1939, and the statement of income and earned surplus for the year then ended, have reviewed the system of internal control and the accounting procedures of the company and, without making a detailed audit of the transactions, have examined or tested accounting records of the company and other

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

supporting evidence, by methods, at times, and to the extent we deemed appropriate.

We present our report consisting of the following financial statements and comments:

Exhibit

A—Balance Sheet, December 31, 1939.

B—Statement of Income and Earned Surplus for the Year ended December 31, 1939.

Plant, Property and Equipment

The plant property and equipment are recorded on the books at the September 1, 1927, valuation determined by The American Appraisal Company, plus subsequent additions at cost and less retirements at book valuation.

Land—\$865,608.55

Recording the land, site of the company's plant, at the September 1, 1927, appraised valuation thereof, \$865,300.00, resulted in a write-up of \$148,775.26, which latter amount is shown as surplus arising from appreciation.

Buildings, Machinery, and Equipment—
\$2,266,017.14

Reserve for Depreciation—\$1,262,709.17

During the year ended December 31, 1939, there was a decrease of \$74,852.67 in the depreciated book valuation of the plant buildings, machinery, and equipment as shown in the following summary:

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

	Plant Buildings, Machinery, and Equipment	Reserve for Depreciation	Depreciated Book Valuation
Amount, December 31, 1938.....	\$2,264,052.41	\$1,185,896.77	\$1,078,155.64
Add:			
1939 additions	3,117.23		
1939 provision for depreciation.....		73,632.36	
Provision for prior years' accumulated depreciation		3,236.47	
Total.....	\$2,267,169.64	\$1,262,765.60	
Deduct 1939 retirements and accrued depreciation thereon	1,157.50	56.43	
Amount, December 31, 1939.....	\$2,266,012.14	\$1,262,709.17	\$1,003,302.97

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Provision for depreciation for the year ended December 31, 1939, has been made at the composite rate of $3\frac{1}{4}\%$ per annum. This rate has been used by the company in making provision in preceding years and is the rate recommended by The American Appraisal Company in connection with its appraisal of the company's plant property and equipment as of September 1, 1927.

Real Estate (Acquired in Settlement of Accounts
With Acme Ice Cream Company)—\$27,922.42

This real estate, previously owned by the Acme Ice Cream Company in connection with the foreclosure sale. Pending appraisal, the real estate was recorded in the accounts at December 31, 1938, at the approximate assessed valuation of \$25,000.00 for the land and \$5,000.00 for the improvements. As of December 31, 1939, these original recorded valuations have been adjusted to reflect an appraised valuation determined by the General Appraisal Company as of May 15, 1940.

Title to the property is recorded in the name of Lloyd R. Arnold. We inspected an unrecorded indenture dated April 20, 1939, by which Mr. Arnold and his wife release and forever quitclaim the real estate unto the Merchants Ice and Cold Storage Company.

At date of acquisition the property was subject to a first mortgage thereon in the amount of \$13,500.00 payable to The Anglo California National

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Bank of San Francisco with interest at the rate of 6% per annum. Subsequent payments under the mortgage have reduced the amount of the principal indebtedness to \$12,100.00 as at December 31, 1938.

Investments in Securities (Cost or Nominal Valuation)—\$26,437.40

The securities owned at December 31, 1939, were as follows:

Pledged as collateral to first mortgage bonds:

Union Merchants Ice Delivery Company — 130 shares common capital stock of \$100.00 each.....	\$22,643.40
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Appleton Investment Company—10 shares common capital stock of \$100.00 each.....	1,000.00
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Purity Spring Water Company—792 shares common capital stock of \$1.00 each.....	792.00
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Acme Ice Cream Company—2,500 shares common capital stock of \$100.00 each.....	1.00
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National Ice and Cold Storage Company of California 3½%-6% gold bonds, due 1952—\$2,00.00 face value	2,000.00
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Pledged as collateral to mortgage payable—Bay Counties Land Company—1,499 shares common capital stock of \$1.00 each.....	1.00
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Total.....	<u>\$26,437.40</u>
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The securities were verified by certifications obtained from the trustee and mortgagee. Market quotations on the securities were not available as at December 31, 1939.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

The income recorded during the year ended December 31, 1939, with respect to the investments was as follows:

Union Merchants Ice Delivery Company.....	\$390.00
Appleton Investment Company.....	20.00
National Ice and Cold Storage Company of California	70.00
Total.....	<u>\$480.00</u>

Cash—\$6,415.57

The cash balances at December 31, 1939, consisted of the following:

Cash on deposit:

The Anglo California National Bank of	
San Francisco	\$ 415.99
Bank of America, N. T. & S. A.....	166.50
Pacific National Bank of San Francisco:	
General account	5,431.08
Trust Account #1.....	1.00
Trust Account #2.....	1.00
Total cash on deposit.....	<u>\$6,015.57</u>
Office fund	400.00
Total.....	<u>\$6,415.57</u>

The office fund was counted and found to consist of cash and vouchers. The cash on deposit was verified by reconciling the amounts with those shown on certifications received directly from the depositaries.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Note Receivable—\$1,503.18

The above amount represents the balance due on a note of Sgobel & Day Company.

We were informed by the attorney for Merchants Ice & Cold Storage Company that the affairs of Sgobel & Day Company are being administered by the Board of Trade and that in his opinion, a final liquidating dividend of not to exceed five per cent of the original indebtedness of \$1,803.86 may be expected. The reserve for doubtful note and accounts receivable includes a provision to cover the anticipated loss on this note.

Accounts Receivable

Customers (Approximately \$77,000.00 Pledged as Collateral to Notes Payable to Bank)—\$107,643.37

Following is a summary of the accounts receivable at December-31, 1939, classified as to age or periods of the charges:

Less than three months.....	\$ 45,250.39
Three to six months.....	40,486.95
Six months to one year.....	7,810.40
Over one year.....	14,095.63
Total.....	<u>\$107,643.37</u>

According to records, \$44,915.08 had been collected on the above accounts during the period from January 1, 1940, to March 31, 1940.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Certain customers whose accounts aggregated \$51,473.13 as of March 31, 1940, were requested to confirm the amounts shown as due from them at that date. With relatively minor exceptions, the debtors responding confirmed the amounts shown as due from them at March 31, 1940.

Other—\$9,497.85

The accounts receivable at December 31, 1939, included under this caption were as follows:

W. A. Sherman, Deceased.....	\$9,356.85
F. Maffei, stockholder and employee (advance in 1931)	135.00
Dividend on two shares Union Merchants Ice Delivery Company capital stock.....	6.00
Total.....	<u>\$9,497.85</u>

Mr. W. A. Sherman resigned as president of the company in 1939. The net increase was \$2,580.09 for the year in the amount due from Mr. Sherman represents advances and charges aggregating \$4,785.09 less salary credits in the amount of \$2,205.00. We were informed that the amount due from the Estate of Mr. Sherman appears to be uncollectible.

The Supplemental Indenture dated April 26, 1937, issued in connection with the company's first mortgage serial bonds states in Article II, Section 8(b) that the company “* * * will not lend its credit or advance any of its funds to any of its sharehold-

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

ers, officers or employees, nor, without a majority of the entire board, including specifically the affirmative vote of the director representing the bondholders, to any other individual, firm or corporation whatsoever; * * *"

Reserve for Doubtful Accounts—\$26,500.00

The notes and accounts receivable were discussed as to collectibility with Mr. Lloyd R. Arnold, President, and from this discussion and the review of the accounts, it appears that the reserve of \$26,500.00 is adequate to provide for losses which may be sustained on the *nate* and accounts as at December 31, 1939.

Due From Globe Brewing Company

With Chattel Mortgage as Collateral Thereto—

\$12,365.02

This amount receivable arose during the year ended December 31, 1939, upon the assumption by the Merchants Ice and Cold Storage Company of its obligation as guarantor of an indebtedness of the Globe Brewing Company to the Acme Breweries. The amount receivable at December 31, 1939, is composed of the following items:

Payment to Acme Breweries made to	
December 31, 1939.....	\$ 8,688.33
Amount due Acme Breweries unpaid at	
December 31, 1939.....	2,476.69
Other expenditures to December 31, 1939.....	1,200.00
Total.....	<u><u>\$12,365.07</u></u>

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

In assuming its obligation, the Merchants Ice and Cold Storage Company acquired the rights of the Acme Breweries as mortgagee under a chattel mortgage on certain machinery and equipment executed by the Globe Brewing Company, as mortgagor. We were informed that subsequent to December 31, 1939, and the payment of the amount of \$2,476.69 due Acme Breweries, an assignment of the chattel mortgage was executed. In the opinion of officers of the company, the amount receivable will be realized in full upon the foreclosure and disposal of the mortgaged machinery and equipment.

Without Collateral—\$11,509.92

This is the amount of the receivable from the Globe Brewing Company arising from charges made prior to January 1, 1939. The receivable was reduced during the year ended December 31, 1939, by \$7,500.00, the estimated realizable value stated in the accounts of bottles and cases received from the debtor in partial settlement of its indebtedness.

Any loss which may be sustained on this account receivable is deemed to be provided for by the reserve for contingencies.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Unamortized Bond Discount and Expense,
and Reorganization Expense—\$32,578.90

These accounts for the year ended December 31, 1939, are summarized in the following:

	Balance, December 31, 1938	Amorti- zation, 1939	Balance, December 31, 1939
Bond discount and expense.....	\$16,177.63	\$1,904.91	\$14,272.72
Reorganization expense	20,749.41	2,443.23	18,306.18
Total.....	<u>\$36,927.04</u>	<u>\$4,348.14</u>	<u>\$32,578.90</u>

The balance is being amortized over the period to the maturity of the first mortgage 6½% serial bonds.

Commissions and Expenses on Preferred
Capital Stock—\$11,063.57

These expenditures and the amount thereof deferred at December 31, 1939, are summarized as follows:

Commissions and expenses paid in prior years in connection with the issuance of the company's preferred capital stock.....	\$15,582.50
Less proportionate amount applicable to shares of the preferred stock reacquired by the company	4,518.93

Remainder—Deferred at December 31, 1939.....\$11,063.57

The amount written off was charged to surplus arising from acquisition of preferred capital stock at less than par value.

(Testimony of Walter O. H. Plagemann.)
 (Plaintiff's Exhibit No. 38—Continued)

First Mortgage 6½% Serial Bonds Maturing From
 April 1, 1942 to April 1, 1949—\$659,500.00

The amount of bonds outstanding at December 31, 1939, was verified by a certification obtained from the trustee.

The maturity dates of the bonds outstanding are as follows:

April 1, 1942.....	\$ 40,000.00
April 1, 1943.....	40,000.00
April 1, 1944.....	38,000.00
April 1, 1945.....	45,000.00
April 1, 1946.....	45,000.00
April 1, 1947.....	45,000.00
April 1, 1948.....	44,000.00
April 1, 1949.....	362,500.00
	<hr/>
	\$659,500.00
	<hr/>

Notes Payable to Bank—\$62,148.15

This indebtedness at December 31, 1939, was represented by notes with various maturities payable to the Pacific National Bank of San Francisco, with interest at the rate of 8% per annum. As collateral thereto accounts receivable aggregating approximately \$77,000.00 at December 31, 1939, were pledged.

We were informed that the Pacific Empire Corporation and Pacific Empire Holdings, Incorporated, jointly have executed a guarantee not to exceed \$50,000.00 with respect to loans obtained by

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

the company from the Pacific National Bank of San Francisco.

The amount of the indebtedness was confirmed by the bank.

Note Payable to Pacific Empire
Holdings, Incorporated

Section 2 of Article II of the Supplemental Indenture dated April 26, 1937, executed by the Merchants Ice and Cold Storage Company in connection with the reorganization of the company, provides as follows:

“The Company covenants and warrants that it has obtained from Pacific Empire Holdings, Inc. and Pacific Empire Corporation (the owners and holders of a majority of the outstanding common stock of the company) an agreement to the effect that, until such time as the Company shall have retired Bonds (exclusive of all bonds heretofore retired and Bonds now held in the treasury) having an aggregate principal amount equal to the aggregate principal amount of Bonds having original maturity dates on or prior to April 1, 1943, to-wit, \$297,000.00 of Bonds, they will look for the payment of the indebtedness now owing to them by the Company in the amount of \$36,750.00, secured by an assignment of all rentals and payments accruing to the Company under that certain lease dated April 28, 1936, between the Company, as

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

lessor, and Globe Brewing Company, as lessee, solely to such security, and that such agreement cannot be modified without the consent of the Trustee."

The changes during the year ended December 31, 1939 in the indebtedness of the Merchants Ice and Cold Storage Company to the Pacific Empire Corporation and Pacific Empire Holdings, Incorporated, are shown in the following summary:

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

	Portion Subordi- nated as Provided Under Section 2 of Article II of Supplemental Indenture	Remainder Not Sub- ordinated
Amount owed, December 31, 1938:		
Pacific Empire Corporation.....	\$23,048.64	
Pacific Empire Holdings, Incorporated.....	3,757.81	
Total.....	\$26,806.45	\$17,221.18
Add demand note dated December 29, 1939, payable to Pacific Empire Holdings, Incorporated, with interest at 6% per annum.....	\$35,000.00	
Total.....	\$61,806.45	
Deduct payments and advances made during 1939.....	41,301.91	
Amount owed, December 31, 1939.....	\$20,504.54	\$10,919.27

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

To provide for the liquidation of the unsubordinated portion of the demand note dated December 29, 1939, and any additional loan or loans, the company on that date assigned to the Pacific Empire Holdings, Incorporated, all the amounts payable to the Merchants Ice and Cold Storage Company by The Union Ice Company under an agreement dated November 1, 1938.

In view of the provision for repayment contained in Section 2 of Article II of the Supplemental Indenture and the fact that the Globe Brewing Company is not in operation, the portion of the note subordinated has been excluded from current liabilities at December 31, 1939.

Miscellaneous Notes and Contracts Payable

The miscellaneous notes and contracts payable classified as a current liability at December 31, 1939, on the accompanying balance sheet were as follows:

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

	Date	Maturity	Interest Rate	Amount
C. C. Moore & Co.....	Various	Various	6%	\$3,909.96
Pacific States Cold Storage Warehousemen's Association	Apr. 1, 1928	Mar. 31, 1939	6%	1,375.00
First Bancredit Corporation.....	Various	Various		869.64
The Anglo California National Bank of San Francisco	Apr. 24, 1939	Various		704.00
Maurice A. Gale & Co.....	Dec. 8, 1939	Various	6%	684.00
Haskins & Sells.....	Oct. 9, 1939	Jan. 9, 1940	6%	509.74
Sunlite Corporation of California.....	Oct. 12, 1939	Various		353.42
Merwin, Holtgen & Fiora.....	Nov. 20, 1939	Various	6%	272.52
E. Masuccio	Nov. 1, 1934	Demand	6%	250.00
Tray-Holbrook	Nov. 16, 1939	Various	6%	151.48
Linda Stribolt	Feb. 10, 1927	30 days	7%	200.00
Total.....				<u>\$9,280.20</u>

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

In addition to the indebtedness shown above, the company is liable to C. C. Moore & Co. in respect of notes payable maturing after December 31, 1940, aggregating \$3,258.42. This amount is not shown as a current liability on the accompanying balance sheet.

Yours truly,

(Signed) JOHN F. FORBES & COMPANY

(Testimony of Walter O. H. Plagemann.)
(Plaintiff's Exhibit No. 38—Continued)

Exhibit A

MERCHANTS ICE AND COLD STORAGE COMPANY
(Incorporated in California)

BALANCE SHEET, DECEMBER 31, 1939
ASSETS

Plant Property and Equipment (September 1, 1927, valuation determined by The American Appraisal Company, plus subsequent additions at cost and less retirements at book valuation:		
Land	\$2,266,012.14	\$ 865,608.55
Buildings, Machinery and equipment.....	1,262,709.17	
Less reserve for depreciation.....		
Remainder—Depreciated book valuation.....		1,003,302.97
Plant property and equipment— Depreciated book valuation.....		\$1,868,911.52
Real Estate (acquired in settlement of accounts with Acme Ice Cream Company):		
Company as of May 15, 1940:		
Land	\$ 15,000.00	
Building—Depreciated valuation	12,922.42	
Total		27,922.42

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Investments in Securities (cost or nominal valuation—Market quotations at December 31, 1939, not available):		
Pledged as collateral to first mortgage bonds.....	\$ 26,436.40	
Pledged as collateral to mortgage payable.....	1.00	
		\$ 26,437.40
Total investments in securities.....		
Current Assets:		
Cash		\$ 6,415.57
Note receivable		
Accounts receivable:		
Customers (approximately \$77,000.00 pledged as collateral to notes payable to bank)	107,643.37	
Other (see Note 1)	9,497.85	
		\$118,644.40
Total		
Less reserve for doubtful note and accounts receivable	26,500.00	
Remainder		92,144.40
Bottles and cases held for sale (estimated realizable value)		7,500.00
Total current assets		106,059.97

(Testimony of Walter O. H. Plagemann.)
(Plaintiff's Exhibit No. 38—Continued)

Due from Globe Brewing Company (see Note 2):		
With chattel mortgage as collateral thereto.....	\$ 12,365.02	
Without collateral	11,509.92	
		\$ 23,874.94
Total due from Globe Brewing Company.....		
Deferred Charges		
Unamortized bond discount and expense and reorganization expense	\$ 32,578.90	
Commissions and expenses on preferred capital stock.....	11,063.57	
Taxes applicable to future period.....	10,672.34	
Insurance premiums—unexpired portion.....	5,077.89	
Other	379.55	
		59,772.25
Total deferred charges.....		
Total		<u>\$2,112,978.50</u>

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

LIABILITIES		
First Mortgage 6½% Serial Bonds, Maturing from April 1, 1942, to April 1, 1939:		
Authorized and originally issued.....	\$1,200,000.00	
Less redeemed and cancelled.....	540,500.00	
		\$ 659,500.00
Remainder—Outstanding.....		9,585.27
Due to Pacific Empire Holdings, Incorporated (see Note 3).....		12,100.00
Mortgage Payable on Other Real Estate.....		3,258.42
Notes Payable (installments maturing after one year).....		
Current Liabilities:		
Notes payable to bank—With customers accounts receivable pledged as collateral.....	\$ 62,148.15	
Other notes and contracts payable:		
Pacific Empire Holdings, Incorporated (see Note 4).....	10,919.27	
Miscellaneous	9,280.20	
Accounts Payable:		
Trade	19,565.35	
Taxes:		
Federal income and State franchise (including interest).....	5,863.17	
Property	23,297.83	
Other	9,613.79	
Accrued interest on bonds.....	10,716.87	
Due on purchase agreements for own preferred capital stock	975.00	
Other	8,004.24	
		160,383.37
Total Current Liabilities.....		15,000.00
Reserve for Contingencies (see Note 2).....		

(Testimony of Walter O. H. Plagemann.)
(Plaintiff's Exhibit No. 38—Continued)

Capital Stock (see Note 5):		
Preferred 7% Cumulative (78,332.5 shares of \$10.00 each; issued, 66,157.5 shares less 24,542.5 shares acquired from stockholders under the provisions of Section 342(1) of the General Corporation Law of the State of Calif. Outstanding, 41,615 shares.....	\$ 416,150.00	
Common (authorized, 500,000 shares without par value; issued, 111,180 shares less 4,000 shares acquired from stockholders under the provisions of Section 342(1) of the General Corporation Law of the State of California. Outstanding, 107,180 shares	999,575.00	\$1,415,725.00
Total Capital stock.....		
Surplus (deficit in red) :		
Arising from:		
Appreciation in value of land.....	\$ 148,775.26	
Acquisition of preferred capital stock at less than par value..	79,387.85	
Acquisition of common capital stock at less than par value..	4,632.19	
Total	\$ 232,795.30	
Earned (deficit in red), per Exhibit B.....	395,369.36*	
Total surplus (deficit in red).....		162,574.06*
Total		\$2,112,978.50

*Denotes red figures.

Note: The notes appearing on the following page entitled "Foot-Notes to Balance Sheet, December 31, 1939" constitute an integral part of the above statement and should be read in conjunction therewith.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Merchants Ice and Cold Storage Company

FOOT-NOTES TO BALANCE SHEET,

DECEMBER 31, 1939

Note:

1. Accounts receivable—Other include \$9,356.85 due from Mr. W. A. Sherman, deceased, who had resigned as president of the company in 1939. The net increase of \$2,580.09 for the year ended December 31, 1939, in the amount receivable represents the excess of advances and charges over salary credits.
2. The Globe Brewing Company was not in operation at December 31, 1939. Any loss which may be sustained on the account receivable without collateral is deemed to be provided for by the reserve for contingencies.
3. The indebtedness to the Pacific Empire Holdings, Incorporated, excluded from current liabilities at December 31, 1939, is subordinated under the provision of Section 2 of Article II of the Supplemental Indenture dated April 26, 1937.
4. To provide for the liquidation of the current liability, the company assigned to the Pacific Empire Holdings, Incorporated all the amounts payable to the Merchants Ice and Cold Storage Company by The Union Ice Company under an agreement dated November 1, 1938.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

5. Payment of dividends on the cumulative preferred capital stock was discontinued on April 30, 1927, and such dividends were in arrears approximately \$369,000.00 at December 31, 1939. One of the provisions of the Supplemental Indenture, dated April 26, 1937, with respect to the company's first mortgage 6½% serial bonds, prohibits the payment of dividends on any class of its stock until such time as the company shall have retired bonds of the face amount of \$297,000.00, which is the amount of presently outstanding bonds having maturities from April 1, 1942 to April 1, 1948, as extended, pursuant to the Supplemental Indenture.
6. The company was contingently liable for notes receivable discounted in the amount of \$58,341.19.

Exhibit B

MERCHANTS ICE AND COLD STORAGE COMPANY STATEMENT OF INCOME AND EARNED SURPLUS FOR THE YEAR ENDED DECEMBER 31, 1939

Revenues:

Storage	\$310,063.73
Ice	60,495.45
Rent	10,161.89
Miscellaneous	5,683.79

Total Revenues \$386,404.86

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Expenses: (exclusive of provision for depreciation):

Executive Salaries	\$ 21,900.00
Office salaries	11,873.32
Other salaries and wages.....	120,139.63
Fuel, power and water.....	40,296.81
Maintenance and repairs—Materials	4,942.27
Miscellaneous plant operating expenses	2,914.51
Taxes	29,503.27
Solicitation, etc.—Entertainment, travel, and other.....	11,938.01
Insurance	7,382.36
Professional services	3,936.27
Stationery and printing and postage	2,459.81
Telephone and telegraph.....	2,412.70
Miscellaneous	5,168.98

Total	\$264,867.94
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Profit from Operation Before Provision for

Depreciation	\$121,536.92
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Other Income Credits:

Dividends received	\$ 410.00
Interest earned	82.84

Total	492.84
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Gross Income Before Provision for Depreciation	\$122,029.76
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Income Charges:

Bond interest	\$ 42,867.50
Other interest	13,437.83
Amortization of reorganization expense and bond discount and expense	4,348.14
Uncollectible accounts receivable.....	1,396.91
Miscellaneous	343.38

Total	62,393.76
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(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibit No. 38—Continued)

Net Income Before Provision for Depreciation.....	\$ 59,636.00
Provision for Depreciation.....	72,632.36
Net Loss	\$ 13,996.36
Surplus Charges:	
Additional loss on acquisition of Acme	
Ice Cream Company Property.....	\$2,077.58
Provision for prior years' accumulated	
depreciation	3,236.47
Taxes applicable to prior year.....	639.28
Total	5,953.33
Gross Deficit for the Year.....	\$ 19,949.69
Surplus Credits—Miscellaneous items applicable	
to prior years.....	2,185.93
Net Deficit for the Year.....	\$ 17,763.76
Deficit at Beginning of Year.....	377,605.60
Deficit at End of Year.....	\$395,369.36

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339.
Plf's Ex. No. 38. Filed 5-6-43. Walter B. Maling,
Clerk. By J. P. Welsh, Deputy Clerk.

Mr. Scampini: I now ask that Exhibits 2, 3, 4, 5 and 6 for identification be admitted in evidence.

Mr. Naus: If your Honor please, I am not disposed to make any objection to their admission, but I do not want to be understood as admitting the validity of them.

The Court: They may be admitted and marked.

(Testimony of Walter O. H. Plagemann.)

(Plaintiff's Exhibits 2, 3, 4, 5 and 6 for Identification were received in evidence.)

Mr. Scampini: I will ask that Plaintiff's Exhibit 13 be admitted in evidence.

Mr. Naus: I make the same comment as to the last offer. I am admitting nothing as to the validity of it.

The Court: It may be admitted and marked.

(Plaintiff's Exhibit 13 for Identification was received in evidence.)

Mr. Scampini: I will ask that Plaintiff's Exhibits 14, 16, 17, 18, 19 and 23 be admitted in evidence and marked. [348]

Mr. Naus: No objection.

The Court: Let them be admitted and marked.

(Plaintiff's Exhibits 14, 16, 17, 18, 19 and 23 for Identification were received in evidence.)

PLAINTIFF'S EXHIBIT No. 16

MERCHANTS ICE AND COLD STORAGE COMPANY

(Incorporated in California)

Lombard and Battery Streets

San Francisco, California

Aug. 4, 1939

To the Stockholders of

Merchants Ice and Cold Storage Company:

The Balance Sheet of the Company, as certified to by Messrs. Haskins & Sells, Certified Public Accountants, as of December 31, 1938, is herewith de-

(Testimony of Walter O. H. Plagemann.)

livered, accompanied by the Profit & Loss Statement with comparisons, showing the results of the operations for the annual period of 1938.

Respectfully submitted,

By Order of the Board of Directors,

L. R. ARNOLD

By: L. R. Arnold, President

HASKINS & SELLS

Certified Public

Accountants

Alexander Building

155 Montgomery Street

San Francisco

ACCOUNTANTS' CERTIFICATE

Merchants Ice and Cold Storage Company:

We have made an examination of your balance sheet as of December 31, 1938 and of the related statement of income and profit and loss deficit for the year 1938. In connection therewith, we made a review of the accounting methods and examined or tested accounting records of the Company and other supporting evidence in a manner and to the extent which we considered appropriate in view of the system of internal accounting control.

In our opinion, based upon our examination, the accompanying balance sheet and the related statement of income and profit and loss deficit with their footnotes, fairly present, in accordance with accepted principles of accounting consistently followed by the Company, its financial condition at December 31, 1938, and the results of its operations for the year ended that date.

HASKINS & SELLS.

April 24, 1939.

(Testimony of Walter O. H. Plagemann.)

MERCHANTS ICE AND COLD STORAGE COMPANY

(Incorporated in California)

BALANCE SHEET, DECEMBER 31, 1938

Assets

Property (value September 1, 1927, as determined by The American Appraisal Company, plus subsequent additions at cost and less retirements at book value):

Land	\$ 890,608.55
Buildings, machinery and equipment (less reserve for depreciation, \$1,185,957.71)	1,083,094.70

\$1,973,703.25

Total property—Depreciated value.....

Investments in Securities—Book value (market value not available; securities are pledged as collateral to first mortgage 6½% serial bonds and mortgage payable).....

Due From Globe Brewing Company (see note 1).....

26,437.40
19,009.92

Current Assets:

Cash	\$ 6,260.07
Notes receivable	\$ 1629.39

(Testimony of Walter O. H. Plagemann.)

Accounts receivable:			
Customers (pledged as collateral to notes payable to banks, approximately \$64,000) (see note 5)	\$78,721.25		
Officer and employees	6,961.70		
Total notes and accounts receivable	\$87,312.34		
Less reserve for doubtful notes and accounts receivable	26,500.00		
Remainder	\$ 60,812.34	\$ 67,072.41	
Total current assets			
Deferred Charges:			
Unamortized reorganization expense and bond discount and expense		\$ 36,927.04	
Commissions and expenses on capital stock (see note 5)		11,063.57	
Prepaid taxes		10,961.03	
Prepaid insurance		8,173.01	
Other		461.70	
Total deferred charges		67,586.35	
Total			\$2,153,809.33

(Testimony of Walter O. H. Plagemann.)

Liabilities

Capital Stock (see note 3):

Preferred 7% cumulative (authorized, 78,332.5 shares of \$10.00 each; issued, 66,157.5 shares, less 24,542.5 shares acquired from stockholders under the provisions of Section 342(1) of General Corporation Law of the State of California—Outstanding, 41,615 shares).....

Common (authorized, 500,000 shares without par value; issued, 111,180 shares, less 4,000 shares acquired from stockholders under the provisions of Section 342(1) of the General Corporation Law of the State of California—Outstanding, 107,180 shares)

\$ 416,150.00

Total capital stock.....

\$1,415,725.00

First Mortgage 6½% Serial Bonds, Maturing From April 1, 1942, to April 1, 1949:

Authorized and originally issued.....

\$1,200,000.00

Less redeemed and canceled.....

540,500.00

Remainder—Outstanding in hands of public.....

659,500.00

Mortgage Payable

13,300.00

Long-Term Instalment Notes Payable (portion maturing after 1 year)

8,038.02

Current Liabilities:

Notes payable to banks:

With collateral (customers' accounts receivable,

approximately \$64,000)

\$64,783.15

Without collateral (endorsed by Pacific Empire

Holdings, Incorporated)

\$ 79,783.15

(Testimony of Walter O. H. Plagemann.)

Notes payable to others:		
Pacific Empire Corporation.....	\$23,048.64	
Pacific Empire Holdings, Incorporated.....	3,757.81	
Miscellaneous	13,149.66	\$ 39,956.11
Accounts payable:		
Trade creditors	\$25,852.67	
Taxes (approximately \$11,300 delinquent).....	24,932.12	
Accrued interest on first mortgage bonds.....	10,716.87	
Other	5,615.69	67,117.35
Total current liabilities.....		186,856.61
Deferred Credits—Rental collected in advance.....		200.00
Reserve for Contingencies (see note 1).....		15,000.00
Surplus (deficit indicated by *) (see note 3):		
Arising from:		
Appreciation in value of land.....	\$ 148,775.26	
Acquisition of capital stock at less than par value.....	84,020.04	
Total	\$ 232,795.30	
Profit and loss (deficit indicated by *).....	* 377,605.60	
Total surplus (deficit indicated by *).....		* 144,810.30
Total		<u>\$2,153,809.33</u>

(Testimony of Walter O. H. Plagemann.)

Note:

1. At December 31, 1938, Globe Brewing Company was not in operation; any loss which may be sustained, however, in the ultimate realization of this receivable is deemed to be provided for by the reserve for contingencies.
2. The Supplemental Indenture, dated April 26, 1937, securing the first mortgage 6½% serial bonds contains, among other provisions, a prohibition against loans and advances to officers, employees, etc., from Company funds. The Company is also an accommodation endorser on note of Mr. Wm. A. Sherman, President (resigned subsequent to December 31, 1938) in the amount of \$2,500.00.
3. Payment of dividends on the cumulative preferred capital stock was discontinued on April 30, 1927, and such dividends were in arrears approximately \$340,000 at December 31, 1938. One of the provisions of the Supplemental Indenture, dated April 26, 1937, with respect to the Company's first mortgage 6½% serial bonds, prohibits the payment of dividends on any class of its stock until such time as the Company shall have retired bonds of the face amount of \$297,000.00, which is the amount of presently outstanding bonds having maturities from April 1, 1942, to April 1, 1948, as extended pursuant to the Supplemental Indenture.
4. The Company was contingently liable for notes

(Testimony of Walter O. H. Plagemann.)

receivable discounted in the amount of approximately \$67,000 at December 31, 1938; as such notes were received in connection with advances made on merchandise stored, the merchandise constitutes collateral to the advances.

5. During the year 1938 the Company made provision for anticipated losses not so provided for as at December 31, 1937, as stated in its annual report at that date: as to doubtful accounts receivable (see note 1) by charge-offs or reserves aggregating approximately \$31,000 (of which \$26,109.40 was charged to deficit account—see statement of income and profit and loss deficit) and as to advances to Acme Ice Cream Company by acquisition of improved San Francisco, California, real estate contiguous to its plants, subject to \$13,500.00 first mortgage thereon.

In this latter transaction the Company also acquired one-sixth of the capital stock of Bay Counties Land Company (pledged under the mortgage) which owns certain tide-lands in Alameda County, California. Pending appraisal to be made in 1939 the real estate has been recorded in the accounts at its approximate assessed value, \$30,000.00 and the capital stock at \$1.00 and the excess of the prior advances to Acme Ice Cream Company over such recorded values, amounting to \$35,798.61, was charged to deficit account (see statement of income and profit and loss deficit). Also during 1938 the

(Testimony of Walter O. H. Plagemann.)

Company wrote off, against surplus arising from acquisition of preferred capital stock at less than par value, the portion of its commissions and expenses incurred in connection with the original issue of its preferred stock applicable to shares of stock reacquired in prior years.

MERCHANTS ICE AND COLD STORAGE COMPANY

STATEMENT OF INCOME AND PROFIT AND LOSS DEFICIT

FOR THE YEARS ENDED DECEMBER 31, 1938 AND 1937, AND COMPARISON

	Year Ended December 31		Increase *Decrease
	1938	1937	
Revenues:			
Storage, ice and refrigeration.....	\$348,185.92	\$417,996.18	* \$ 69,810.26
Rent	10,805.00	10,990.00	* 185.00
Miscellaneous	5,677.08	7,111.60	* 1,434.52
Total	\$364,668.00	\$436,097.78	* \$ 71,429.78
Expenses (exclusive of provision for depreciation) :			
Executive salaries	\$ 13,755.00	\$ 17,170.00	* \$ 3,415.00
Other salaries and wages	132,548.44	144,503.91	* 11,955.47
Fuel and power	39,235.33	45,080.40	* 5,845.07
Taxes	27,042.36	26,125.73	916.63
Other plant operating expense	20,901.87	32,210.90	* 11,309.03
Loss and damage	5,068.97	5,797.30	* 728.33
Solicitation, etc.—Entertainment, travel, and other	4,694.90	17,134.19	* 12,439.29
Professional services	4,347.38	4,214.68	132.70
Miscellaneous general and administrative expenses	14,776.88	16,218.99	* 1,442.11
Total	\$262,371.13	\$308,456.10	* \$ 46,084.97

(Testimony of Walter O. H. Plagemann.)

	Year Ended December 31 1938	1937	Increase •Decrease
Profit From Operations Before Provision for Depreciation.....	\$102,296.87	\$127,641.68	* \$ 25,344.81
Other Income Credits.....	192.74	1,344.00	* 1,151.26
Gross Income Before Provision for Depreciation.....	\$102,489.61	\$128,985.68	* \$ 26,496.07
Income Charges:			
Bond interest	\$ 42,867.50	\$ 42,802.49	\$ 65.01
Other interest	12,084.68	10,722.63	1,362.05
Amortization of reorganization expense and bond discount and expense	4,348.14	3,737.33	610.81
Uncollectible accounts receivable (less miscellaneous credits in 1938 of \$559.77) (see also additional provision in "Other Charges to Deficit Account")	20,952.22	7,280.05	13,672.17
Loss on sale of shares of stock of Merchants Ice Acceptance Corporation		380.50	* 380.50
Total	\$ 80,252.54	\$ 64,923.00	\$ 15,329.54

(Testimony of Walter O. H. Plagemann.)

	Year Ended December 31 1938	1937	Increase •Decrease *
Net Income Before Provision for Depreciation.....	\$ 22,237.07	\$ 64,062.68	* \$ 41,825.61
Provision for Depreciation.....	73,614.24	72,486.71	1,127.53
Net Loss for the Year.....	\$ 51,377.17	\$ 8,424.03	\$ 42,953.14
Other Charges to Deficit Account (see notes to accompanying balance sheet):			
Provision for uncollectible accounts applicable to prior years.....	\$ 26,109.40		\$ 26,109.40
Loss on acquisition of Acme Ice Cream Company property.....	35,798.61		35,798.61
Provision for contingencies.....	15,000.00		15,000.00
Total	\$ 76,908.01		\$ 76,908.01
Deficit for the Year.....	\$128,285.18	\$ 8,424.03	\$119,861.15
Profit and Loss Deficit at Beginning of Year.....	249,320.42	240,896.39	8,424.03
Profit and Loss Deficit at End of Year.....	\$377,605.60	\$249,320.42	\$128,285.18

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Plif's Ex. No. 16. Filed 5-6-43.
Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

(Testimony of Walter O. H. Plagemann.)

PLAINTIFF'S EXHIBIT No. 17

MERCHANTS ICE AND COLD STORAGE
COMPANY

(Incorporated in California)

Lombard and Battery Streets
San Francisco, California

June 15, 1940

To the Stockholders of

Merchants Ice and Cold Storage Company:

The Balance Sheet of the company, as certified to by Messrs. John F. Forbes and Company, Certified Public Accountants, as of December 31, 1939, is delivered herewith, accompanied by the Profit and Loss Statement, showing the result of the operation of the company for the year 1939.

Respectfully submitted,

By Order of the Board of Directors,

L. R. ARNOLD

By L. R. Arnold, President.

(Testimony of Walter O. H. Plagemann.)

Offices in
San Francisco
New York
Chicago
Los Angeles
Seattle

Crocker Building
San Francisco

JOHN F. FORBES & COMPANY
Certified Public Accountants

INDEPENDENT CERTIFIED PUBLIC
ACCOUNTANTS' OPINION

Merchants Ice and Cold Storage Company:

We have examined the balance sheet of the Merchants Ice and Cold Storage Company as of December 31, 1939, and the statement of income and earned surplus for the year ended that date, have reviewed the system of internal control and the accounting procedures of the company, and without making a detailed audit of the transactions, have examined or tested accounting records of the company and other supporting evidence, by methods, at times, and to the extent we deemed appropriate.

Provision for depreciation for the year ended December 31, 1939, has been made at the composite rate of $3\frac{1}{4}\%$ per annum. This rate has been used by the company in making provisions in preceding years and is the rate recommended by The Ameri-

(Testimony of Walter O. H. Plagemann.)

can Appraisal Company in connection with its appraisal of the company's plant property and equipment as of September 1, 1927.

In our opinion, the accompanying balance sheet and related statement of income and earned surplus, with notes thereon, present fairly the position of the Merchants Ice and Cold Storage Company at December 31, 1939, and the results of its operations for the year, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

JOHN F. FORBES & COMPANY.

San Francisco,

June 5, 1940.

(Testimony of Walter O. H. Plagemann.)

MERCHANTS ICE AND COLD STORAGE COMPANY
(Incorporated in California)

BALANCE SHEET, DECEMBER 31, 1939

Assets

Plant, Property and Equipment (September 1, 1927, valuation determined by The American Appraisal Company, plus subsequent additions at cost and less retirements at book valuation):

Land	\$ 865,608.55
Buildings, machinery and equipment.....	\$2,266,012.14
Less reserve for depreciation.....	1,262,709.17

Remainder—Depreciated book valuation.....	1,003,302.97
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Plant property and equipment—Depreciated book valuation

\$1,868,911.52

Real Estate (acquired in settlement of accounts with Acme Ice Cream Company):

Valuation determined by General Appraisal Company as of May 15, 1940:

Land	\$ 15,000.00
Building—Depreciated valuation	12,922.42

Total	27,922.42
-------------	-----------

(Testimony of Walter O. H. Plagemann.)

Investments in Securities (cost or nominal valuation—Market quotations at December 31, 1939, not available):		
Pledged as collateral to first mortgage bonds	\$ 26,436.40	
Pledged as collateral to mortgage payable	1.00	
		\$ 26,437.40
Total investments in securities		
Current Assets:		
Cash		\$ 6,415.57
Note receivable		\$ 1,503.18
Accounts receivable:		
Customers (approximately \$77,000.00 pledged as collateral to notes payable to bank)	107,643.37	
Other (see Note 1)	9,497.85	
		\$118,644.40
Total		
Less reserve for doubtful note and accounts receivable		26,500.00
Remainder		
Bottles and cases held for sale (estimated realizable value)	92,144.40	
	7,500.00	
Total current assets		106,059.97

(Testimony of Walter O. H. Plagemann.)

Due From Globe Brewing Company (see Note 2) :			
With chattel mortgage as collateral thereto.....	\$	12,365.02	
Without collateral		11,509.92	
			\$ 23,874.94
Deferred Charges:			
Unamortized bond discount and expense and reorganization expense	\$	32,578.90	
Commissions and expenses on preferred capital stock.....		11,063.57	
Taxes applicable to future period.....		10,672.34	
Insurance premiums—unexpired portion.....		5,077.89	
Other		379.55	
			59,772.25
Total deferred charges.....			
Total			\$2,112,978.50

(Testimony of Walter O. H. Plagemann.)

Liabilities

First Mortgage 6½% Serial Bonds, Maturing From April 1, 1942, to April 1, 1949:

Authorized and originally issued.....
 Less redeemed and cancelled.....

\$1,200,000.00
 540,500.00

Remainder—Outstanding
 Due to Pacific Empire Holdings, Incorporated (see Note 3)
 Mortgage Payable on Other Real Estate.....
 Notes Payable (installments maturing after one year).....

\$659,500.00
 9,585.27
 12,100.00
 3,258.42

Current Liabilities:

Notes payable to bank—With customers' accounts receivable
 pledged as collateral.....
 Other notes and contracts payable:

\$ 62,148.15

Pacific Empire Holdings, Incorporated (see Note 4)
 Miscellaneous

10,919.27
 9,280.20

Accounts payable:

Trade

19,565.35

Taxes:

Federal income and State franchise (including interest).....
 Property

5,863.17
 23,297.83

Other

9,613.79

Accrued interest on bonds.....

10,716.87

Due on purchase agreements for own preferred capital stock.....
 Other

975.00
 8,004.24

Total current liabilities.....

160,383.87

(Testimony of Walter O. H. Plagemann.)

Reserve for Contingencies (see Note 2).....	\$ 15,000.00
Capital Stock (see Note 5):	
Preferred 7% cumulative (78,332.5 shares of \$10.00 each; issued, 66,157.5 shares less 24,542.5 shares acquired from stockholders under the provisions of Section 342(1) of the General Corporation Law of the State of California—Outstanding, 41,615 shares).....	\$ 416,150.00
Common (authorized, 500,000 shares without par value; issued, 111,180 shares less 4,000 shares acquired from stockholders under the provisions of Section 342(1) of the General Corporation Law of the State of California—Outstanding, 107,180 shares)	999,575.00
Total capital stock.....	1,415,725.00
Surplus (deficit indicated by *):	
Arising from:	
Appreciation in value of land.....	\$ 148,775.26
Acquisition of preferred capital stock at less than par value	79,387.85
Acquisition of common capital stock at less than par value.....	4,632.19
Total	\$ 232,795.30
Earned (deficit indicated by *).....	* 395,369.36
Total surplus (deficit indicated by *).....	* 162,574.06
Total	<u><u>\$2,112,978.50</u></u>

(Testimony of Walter O. H. Plagemann.)

Note:

1. Accounts receivable—Other include \$9,356.85 due from Mr. W. A. Sherman, deceased, who had resigned as president of the company in 1939. The net increase of \$2,580.09 for the year ended December 31, 1939, in the amount receivable represents the excess of advances and charges over salary credits.
2. The Globe Brewing Company was not in operation at December 31, 1939. Any loss which may be sustained on the account receivable without collateral is deemed to be provided for by the reserve for contingencies.
3. The indebtedness to the Pacific Empire Holdings, Incorporated, excluded from current liabilities at December 31, 1939, is subordinated under the provision of Section 2 of Article II of the Supplemental Indenture dated April 26, 1937.
4. To provide for the liquidation of the current liability, the company assigned to the Pacific Empire Holdings, Incorporated, all the amounts payable to the Merchants Ice and Cold Storage Company by The Union Ice Company under an agreement dated November 1, 1938.
5. Payment of dividends on the cumulative preferred capital stock was discontinued on April 30, 1927, and such dividends were in arrears approximately \$369,000.00 at December 31, 1939. One of the provisions of the Supplemental

(Testimony of Walter O. H. Plagemann.)

Indenture, dated April 26, 1937, with respect to the company's first mortgage 6½% serial bonds, prohibits the payment of dividends on any class of its stock until such time as the company shall have retired bonds of the face amount of \$297,000.00, which is the amount of presently outstanding bonds having maturities from April 1, 1942, to April 1, 1948, as extended, pursuant to the Supplemental Indenture.

6. The company was contingently liable for notes receivable discounted in the amount of \$58,-341.19.

MERCHANTS ICE AND COLD STORAGE COMPANY
STATEMENT OF INCOME AND EARNED SURPLUS
FOR THE YEAR ENDED DECEMBER 31, 1939

Revenues:

Storage, ice and refrigeration.....	\$380,721.07	
Miscellaneous	5,683.79	
	<hr/>	
Total revenues		\$386,404.86

Expenses (exclusive of provision for depreciation):

Executive salaries	\$ 21,900.00	
Other salaries and wages.....	132,012.95	
Fuel, power and water.....	40,296.81	
Taxes	29,503.27	
Other plant operating expense.....	7,856.78	
Solicitation, etc.—Entertainment, travel, and other.....	11,938.01	
Professional services	3,936.27	
Miscellaneous general and adminis- trative expenses	17,423.85	
	<hr/>	
Total		264,867.94

(Testimony of Walter O. H. Plagemann.)

Profit From Operations Before Provision for

Depreciation	\$121,536.92
Other Income Credits.....	492.84

Gross Income Before Provision for Depreciation... \$122,029.76

Income Charges:

Bond interest	\$ 42,867.50
Other interest	13,437.83
Amortization of reorganization ex- pense and bond discount and expense	4,348.14
Uncollectible accounts receivable.....	1,396.91
Miscellaneous	343.38

Total 62,393.76

Net Income Before Provision for Depreciation..... \$ 59,636.00

Provision for Depreciation..... 73,632.36

Net Loss \$ 13,996.36

Surplus Charges:

Additional loss on acquisition of Acme Ice Cream Company prop- erty	\$ 2,077.58
Provision for prior years' accumu- lated depreciation	3,236.47
Taxes applicable to prior year.....	639.28

Total 5,953.33

Gross Deficit for the Year..... \$ 19,949.69

Surplus Credits—Miscellaneous Items Applicable
to Prior Years..... 2,185.93

Net Deficit for the Year..... \$ 17,763.76

Deficit at Beginning of Year..... 377,605.60

Deficit at End of Year..... \$395,369.36

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22338R.
Plf's Ex. No. 17. Filed 5-6-43. Walter B. Maling,
Clerk. By J. P. Welsh, Deputy Clerk.

(Testimony of Walter O. H. Plagemann.)

PLAINTIFF'S EXHIBIT No. 18

MERCHANTS ICE AND COLD STORAGE
COMPANY

Lombard and Battery Streets

Telephone GARfield 7644

San Francisco

February 19, 1942.

To the Stockholders of
Merchants Ice and Cold Storage Company:

This time last year, just prior to our annual stockholders' meeting, it was announced that a new leadership had assumed the management of your company. The announcement related certain facts concerning the caliber of the new leaders, and intimated that the inauguration of definite policies, which had been conceived and were to be developed would improve the financial position in a comparatively short period of time. Bearing in mind that the present officers have been directing the affairs of the company for a period of only eleven months of the year 1941, and based on preliminary results for the year, it appears that the predictions made at that time were rather well founded.

For the first time during the past ten years your company will show a net profit of somewhere in the neighborhood of \$5,000.00, compared to a net loss for the previous year of more than \$50,000.00.

For the first time in many years current assets

(Testimony of Walter O. H. Plagemann.)

exceed current liabilities. The ratio is by no means what is desired, but on the other hand, when it is considered the accounts payable at the beginning of last year stood well over \$30,000.00, compared to less than \$9,000.00 as at the close of the year, with a corresponding decrease in funds borrowed of approximately \$20,000.00, there is a clear indication of considerable progress.

Moreover, the fact that all taxes, interest on bonded indebtedness and other outstanding obligations were met promptly as they became due plus a reduction in funds borrowed denotes careful and economical operation.

While these accomplishments have undeniably strengthened the credit and improved the current position of the company the outlook for the present year is somewhat mixed. Operating costs of every description have increased tremendously, labor and materials in particular, with further increases in prospect. The present state of war, it is true, has increased the demand for cold storage occupancy, especially freezer space, (below zero temperatures). Unfortunately, the amount of freezer space, compared to cooler facilities (32 degrees to 40 degrees) is very limited, consequently heavy expenditures at a time when costs are soaring may be necessary for the purpose of making cooler rooms adaptable for sub-zero temperatures.

Furthermore, your company faces a severe drain upon its resources during the month of April of

(Testimony of Walter O. H. Plagemann.)

this year when the first maturity of bonds in the sum of \$40,000.00 must be retired, together with bond interest and taxes all becoming due at approximately the same time. In view of these circumstances operations for the year 1942 will demand the most watchful and skillful management that your officers are capable of rendering, challenging their abilities and energies to the utmost.

The formal notice of the annual stockholders' meeting to be held at the hour of 10:00 a. m. on Monday, the 2nd day of March, 1942, is herewith enclosed, with a Proxy and self-addressed reply card to be signed and returned in order that your stock will be represented at the meeting, in the event you are unable to attend in person.

The management urges your attendance at the meeting, in order that you may be fully informed concerning all matters pertaining to the operation of your company.

Respectfully yours,

BY ORDER OF THE BOARD OF
DIRECTORS,

PETER BER CUT, President.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22338. Plfs. Ex. No. 18. Filed 5-6-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

(Testimony of Walter O. H. Plagemann.)

PLAINTIFF'S EXHIBIT No. 19

MERCHANTS ICE AND COLD STORAGE
COMPANY

Lombard and Battery Streets
Telephone GARfield 7644
San Francisco

February 19, 1941.

To the Stockholders of
Merchants Ice and Cold Storage Company:

On February 1st of this year your Board of Directors elected a new President and Vice President to direct the affairs of your company in the future. This new leadership is composed of two brothers, namely, Peter and Henri Bercut, whose record for successful management is well known, not only in the State of California, but throughout the entire country. In addition to being the chief executive of your company the new leader is actively the President of the following corporations:

The English Estate Co.: Owning and operating land, orchards and cannery site adjacent to the City of Sacramento;

The Bercut-Richards Packing Co.: One of the largest packers of fruits and vegetables in the state.

The Markets Investment Co.: Owners and lessors of land and market properties.

(Testimony of Walter O. H. Plagemann.)

The San Francisco City Calf Skin Co.: Specializing in the selection and cure of calfskins and hides.

Bercut Bros. Co.: Operating the Grant Market, in the City of San Francisco, whose volume of business at this location, according to some authorities is not exceeded at any other individual establishment elsewhere in the United States.

The two brothers also own and operate extensive apartment house properties in this city and serve as directors in various associations and institutions.

Their financial stability, their close contacts with the growers, producers, processors and packers of food products are ideally suited to strengthen and utilize the capacities of your properties.

Upon his election, the new president outlined briefly his aims and ambitions. His initial action based on a naturally limited exploration of the operations of your company was to effect substantial savings in interest rates and other fixed charges. Administrative salaries were considerably reduced. Moreover, he made a declaration that until such time as the financial position of the company warranted it, he did not propose to draw any salary for his services.

With the co-operation of your Board of Directors, the personnel of your organization, your preferred creditors, the bondholders, and the good-will of your many valued customers, he expressed profound con-

(Testimony of Walter O. H. Plagemann.)

fidence and utmost faith that the financial statements of your company will show a marked improvement in a comparatively short period of time.

The formal notice of the annual stockholders' meeting to be held at the hour of 10:00 a.m. on Monday, the 3rd day of March, 1941, is herewith enclosed, with a Proxy and self-addressed reply card to be signed and returned in order that your stock will be represented at the meeting, in the event you are unable to attend in person.

The management urges your attendance at the meeting, in order that you may be fully informed concerning all matters pertaining to the operation of your company.

Respectfully yours,

BY ORDER OF THE BOARD OF
DIRECTORS,

PETER BERGUT, President.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22338R. Plfs. Ex. No. 19. Filed 5-6-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

PLAINTIFF'S EXHIBIT No. 23

MERCHANTS ICE AND COLD STORAGE COMPANY

SCHEDULE OF EXPENSE

	1936	1937	1938	1939
Total Operating Revenue.....	\$353,321.28	\$437,023.65	\$363,879.42	\$392,076.81
Operating Expense:				
Warehouse Labor	\$ 75,902.51	\$ 96,866.41	\$ 81,712.17	\$ 90,859.68
Engine Room Labor.....	28,310.26	33,628.35	31,146.67	32,016.28
Power, Light & Water.....	45,443.98	47,668.93	41,136.78	40,297.10
Maintenance & Repairs.....	7,439.16	10,924.67	6,863.16	7,779.90
Ammonia		915.24	963.33	
Taxes	19,795.48	20,147.40	20,615.54	20,569.32
Capital Stock Taxes.....	275.00			
Unemp. Res. Payroll Taxes.....	1,300.40	3,190.49	4,573.25	4,729.42
Social Security Taxes.....	144.49	1,963.67	1,374.29	1,467.15
Insurance	8,712.89	10,630.05	9,089.45	8,495.21
Salaries: Officers & Clerks.....	29,243.59	30,946.02	32,536.79	32,531.59
Rent	900.00	900.00	525.00	900.00
Cartage, Loss & Damage, Uncollectible Accounts	31,687.51	11,396.35	3,061.10	301.49
Tariff Adjustments				5,129.57
Total Operating Expense	\$249,155.27	\$269,177.88	\$233,597.53	\$245,076.71

Peter Bercut, et al.

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(Testimony of Walter O. H. Plagemann.)

(Testimony of Walter O. H. Plagemann.)

	1936	1937	1938	1939
Administration Expense:				
Soliciting	\$ 5,637.00	\$ 5,668.32	\$ 3,974.57	\$ 3,089.53
Automobile Expense	5,933.58	5,265.06	1,428.77	727.54
Officers Expense	4,009.55	2,934.98	1,490.50	1,539.45
Legal Expense	3,594.66	2,649.97	2,400.00	2,520.00
Advertising	939.63	515.69	399.49	30.00
Donations	863.32	202.00	152.00	107.50
Telephone & Telegraph	2,338.88	2,527.65	2,405.56	2,412.70
Postage	512.79	652.27	607.09	611.19
Supplies, Stationery	3,281.98	3,247.99	2,699.08	1,860.36
Auditors	1,238.89	1,564.71	1,549.74	1,200.00
Miscellaneous, Sundries	11,818.34	7,549.87	2,304.12	3,231.36
Dues & Subscriptions	4,754.70	1,787.81	699.38	1,619.44
Misc. General Expense	1,040.43	1,643.62	2,112.16	2,866.16
Total Administration Expense	\$ 45,963.74	\$ 36,200.94	\$ 22,222.46	\$ 21,815.23
Total Expense	\$295,119.01	\$305,378.82	\$255,819.99	\$266,891.94
Net Operating Profit	\$ 58,202.27	\$131,644.83	\$108,059.43	\$125,184.87

(Testimony of Walter O. H. Plagemann.)

	1936	1937	1938	1939
Other Income Credits:				
Interest	\$ 722.38	\$ 639.85	\$ 152.74	\$ 47.84
Dividends	110.00	1,344.00	95.71	1,459.34
Total	<u>\$ 832.38</u>	<u>\$ 1,983.85</u>	<u>\$ 248.45</u>	<u>\$ 1,507.18</u>
Gross Income	\$ 59,034.65	\$133,628.68	\$108,307.88	\$126,692.05
Other Income Charges:				
Bond Interest	\$ 43,582.52	\$ 42,802.49	\$ 42,867.50	\$ 42,867.50
Other Interest	9,889.02	10,638.79	10,714.05	10,562.78
2% on Bonds	614.90	619.13		
Profit & Loss	<u>4,923.21</u>	<u>137.12</u>		
Total	<u>\$ 59,009.65</u>	<u>\$ 54,197.53</u>	<u>\$ 53,581.55</u>	<u>\$ 53,430.28</u>
Net Profit Before Depreciation	\$ 25.00	\$ 79,431.15	\$ 54,726.33	\$ 73,261.77

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Plf's Ex. No. 23. Filed 5-6-43.
Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

Mr. Scampini: We submit the plaintiff's case.

F. C. WHITE,

called for defendants; sworn.

Direct Examination

Mr. Brownstone: Q. Mr. White, with what firm are you associated at the present time?

A. National Quotation Bureau.

Q. How long have you been associated with that firm? A. Eighteen years.

Q. What is your position with the firm at the present time? A. Pacific Coast manager.

Q. Will you state generally to the Court what business the National Quotation Bureau engages in.

A. Our function, our primary function, is to create the medium for dealers for the exchange of accurate purchase and sale orders with each other, and in so doing we publish a trade service.

Q. Does that trade service set forth the bid and ask price for various unlisted securities?

A. Yes, it does.

Q. From whom do you get the information from which these service reports are made?

A. All of our information comes from the dealers themselves, from our customers.

Q. If a dealer in unlisted securities makes a bid for a certain security in the market, he forwards that bid to you and you enter that bid in your trade service? A. That is right.

Q. Similarly, if he has any securities for sale he forwards the price at which he is willing to sell, and you print that [349] in your report?

(Testimony of F. C. White.)

A. Yes, that is correct.

Q. Are the records that you compile used and relied upon by dealers in the unlisted market, that is, either the bid or asked price for the securities set forth in these reports?

A. I think it is generally conceded that they are.

Q. Now, in response to our request you have brought with you, have you not, your records dealing with Merchants Ice & Cold Storage securities for a certain period?

A. Yes.

Q. Now, preliminarily, your reports are published in bound form semiannually, are they not?

A. Yes. After the reporting of the quotations they are subsequently recorded in publications which are issued monthly.

The Court: Q. Do you have a daily service?

A. We publish a daily service, your Honor.

Mr. Brownstone: Q. Will you produce for us, Mr. White, your report on the common and preferred shares of Merchants Ice & Cold Storage Company for the month of January, 1941.

A. This will cover up to January 10.

Q. Mr. White, you have produced in response to my question the National Monthly Stock Summary, issue of January 10, 1941, and I will ask you to turn to the page which will reflect bid and ask prices on Merchants Ice & Cold Storage common and preferred shares.

A. Yes, I have it.

Q. Will you read into the record, Mr. White—

The Court: What page, for the record? Identify the page.

(Testimony of F. C. White.)

The Witness: 695.

Mr. Brownstone: Q. You are now reading from page 695 of the National Monthly Stock Summary, issue of January 10, 1941, with respect to the bid and ask prices on Merchants Ice & Cold Storage Company common and preferred shares?

A. Yes. [350]

Q. Will you read that into the record.

A. Do you wish the complete record of preferred and common shares?

Q. Yes.

A. With regard to the bid and asked price and the date?

Q. Yes. A. January 4, 1941, 11½ bid.

Q. For preferred shares?

A. On the preferred.

Q. What firm bid that?

A. Stephenson Leydecker & Company of San Francisco.

Q. Is that a brokerage firm in San Francisco?

A. Their office is now closed; they are in Oakland.

Q. \$1.50 a share? A. \$1.50.

Q. Will you continue reading?

A. On January 8, 1941, \$1 bid by Shaw Hooker & Company.

The Court: Q. Are those for preferred?

A. Those are preferred. In this particular issue there is no quotation on the common, subsequent to November 1, 1940.

(Testimony of F. C. White.)

Mr. Brownstone: Q. What quotation is shown as of November 1, 1940, for the common?

A. 10 cents bid, offered at $\frac{3}{4}$.

Q. Offered at $\frac{3}{4}$? A. Yes.

Q. Now, you referred to Stephenson Leydecker & Company bid of $1\frac{1}{2}$ on 100 1-4-41; Shaw Hooker & Company on 1-8-41, 100 shares at \$1. The record also shows a bid of Ellworthy & Co. as of 11-1-40 at \$1, and it also reflects a bid of Hansford & Talbot as of 12-2-40 of 100 shares at \$1.50. A. Yes.

Q. Will you tell me what the preferred shares were offered at there?

A. Well, the quotation of November 1, 1940, shows \$1 bid, offered at \$2.

Q. I show you now the National Monthly Stock Summary, issue of December 10, 1940, and call your attention to page 594, reflecting bid and ask prices on Merchants Ice & Cold Storage [351] Company of San Francisco, par \$10 on preferred and also on the common, and I ask you to state from the page the name of the firm, the date, the amount of the bid and the number of shares on the preferred and common on November 1, 1940.

A. Ellworthy & Company, \$1 bid, offered at \$2.

Q. Preferred or common?

A. This was preferred. On December 2, 1940, Hansford & Talbot of San Francisco bid $1\frac{1}{2}$.

Q. For how many shares?

A. For 100 shares.

Q. Preferred?

(Testimony of F. C. White.)

A. Preferred. On December 6, 1940, Shaw Hooker & Company of San Francisco bid $11\frac{1}{4}$ for 100 shares.

Q. What is the bid for the common as reflected in that report?

A. The bid on the common is identical with the one given previously as of November 1, 1940, of 10 cents bid, offered at $\frac{3}{4}$, Ellworthy & Company.

Mr. Scampini: Q. For how many shares?

A. There is no amount given.

Mr. Brownstone: Q. Now, Mr. White, in addition to publishing special reports concerning the bid and ask prices on stocks, do you also publish official reports reflecting the bid and ask prices on unlisted bonds? A. Yes, we do.

Q. I show you what purports to be the National Quotation Bond Summary, issue of December 1, 1940, published by National Quotation Bureau, and calling your attention to page 544, I will ask you to read into the record the bid prices and asked prices for Merchants Ice & Cold Storage Company of San Francisco $61\frac{1}{2}$ bonds with the name of the brokers.

A. On July 28, 1940, Stephenson Leydecker & Company of San Francisco bid 78 for five bonds. On August 6, 1940, F. M. Brown & Company of San Francisco offered two bonds at 82. On August 12, 1940, Golboff & Hess of San Francisco offered five [352] bonds at 86. August 29, 1940, Hansford & Talbot of San Francisco bid 76 and offered at 79 five bonds. On August 30, 1940, F. H. Junger &

(Testimony of F. C. White.)

Company, New York, bid 79. On October 30, 1940, Ellworthy & Company, San Francisco, offered one bond at 75. On January 26, 1940, Shafft, Snook & Cahn bid 65 and offered at 70 five bonds. On November 28, 1940, Shaw Hooker & Company of San Francisco bid 70 for two bonds.

Q. Mr. White, I now wish you would come back to the stock of this corporation. I show you the National Stock Summary in bound form of April, 1940, and call your attention to page 1773, and I will ask you to give us the names of the firms, the date of the bid, the amount bid, and the price of the bid for Merchants Ice & Cold Storage Company preferred and common shares.

A. On the preferred on December 1, 1939, F. M. Brown & Company of San Francisco bid \$1 for 100 shares. January 2, 1940, Ellworthy & Company of San Francisco bid \$1.15. On January 6, 1940, Chapman & Company of San Francisco bid \$1.25 for 500 shares. February 5, 1940, Shaw Hooker & Company of San Francisco bid $1\frac{1}{8}$ for 500 shares. February 6, 1940, Frank Wilson & Company of San Francisco bid $1\frac{1}{4}$ for 500 shares. On April 2, 1940, Hansford Talbot of San Francisco bid \$1.25 for 100 shares.

Q. Those were all preferred shares?

A. Those were all preferred. On the common on March 16, 1940, Ellworthy & Company of San Francisco bid 10 cents for 1,000 shares.

Q. Mr. White, now let me show you what pur-

(Testimony of F. C. White.)

ports to be the National Stock Summary, bound volume, issue of April, 1941, and call your attention to page 1677, and I will ask you to give us the name of the brokers, the date of the bid, the amount of the bid, and the price at which the common and preferred shares were bid for and offered as set forth in that summary. [353]

A. On December 2, 1940, Hansford Talbot of San Francisco bid $1\frac{1}{2}$ for 100 shares.

The Court: Q. That is for preferred?

A. Yes, these are preferred share quotations. On February 10, 1941, F. M. Brown & Company of San Francisco bid $1\frac{1}{2}$ for 1,000 shares. March 3, 1941, Elworthy & Company of San Francisco bid $1\frac{1}{2}$, offered at $2\frac{1}{2}$. April 5, 1941 Stephenson Leydecker & Company of San Francisco bid $1\frac{1}{2}$ for 100 shares. On April 7, 1941, Shaw Hooker & Company bid $1\frac{1}{2}$ for 500 shares. On the common on April 3, 1941, Elworth & Company of San Francisco bid 40 cents for 500 shares. That is all.

Mr. Brownstone: Q. Mr. White, I now show you the National Stock Summary bound edition for April, 1942, and call your attention to page 1618. Will you give the same information from that page as you have just given with respect to Merchants Ice & Cold Storage Company.

A. On the preferred, January 28, 1942, Wilson & Company of San Francisco bid \$2 for 200 shares. On March 21, 1942, Elworthy & Company of San Francisco, \$2 bid for 100 shares. April 2, 1942,

(Testimony of F. C. White.)

F. M. Brown & Company of San Francisco, \$2 bid for 500 shares. On April 4, 1942, Lewis & Broy Company of San Francisco, \$2 bid for 1,000 shares. On April 7, 1942, Schafft, Snook & Cahn of San Francisco, \$2.50 for 500 shares, and on the same day Stephenson Leydecker & Company of San Francisco, \$2 for 100 shares.

Q. That is all preferred?

A. Yes. On January 6, 1942, Shaw Hooker & Company of San Francisco, 50 cents bid for 1,000 shares. February 5, 1942, Monasch & Company of San Francisco, 25 cents bid for 500 shares. March 2, 1942, Elworthy & Company of San Francisco, 50 cents a share. On April 2, 1942, F. M. Brown & Company of San Francisco, 50 cents bid for 1,000 shares, [354] and on the 7th of April, 1942, Schafft, Snook & Cahn, 50 cents bid for 500 shares. That is all.

Q. I show you now, Mr. White, the National Quotation Bond Summary, bound issue of January, 1941, and call your attention to page 1285 of that book. Will you be kind enough to give us the same information relative to the bid and asked prices for the 6½ per cent bonds.

A. Some of these may be duplications. August 12, 1940, Schafft, Snook & Cahn, San Francisco, offered 5 bonds at 86. August 30, 1940, Junger & Company, New York, 79 bid. October 30, 1940, Elworthy & Company, San Francisco, offered one bond at 75. January 26, 1940, Schaffner & Company

(Testimony of F. C. White.)

of San Francisco, 65 bid, offered at 70, 5 bonds. On December 21, 1940, Monett & Company of San Francisco bid 60½ for 3 bonds. On December 24, 1940, F. M. Brown & Company, 65 bid, offered at 70, 5 bonds. On December 26, 1940, Hansford & Talbot, San Francisco, 3 bonds, 65 bid, 2 bonds offered at 70. December 27, 1940, Shaw Hooker & Company, San Francisco, 3 bonds, 68½ bid. December 28, 1940, Stephenson Leydecker & Company, San Francisco, 65 bid, offered at 70. February 23, 1940, Shaw Hooker & Company of San Francisco, 80½ bid for 2 bonds.

Q. That is February, 1940? A. Yes.

Q. The others were as of December, 1940, and the last one was as of February, is that correct?

A. Yes.

Mr. Brownstone: I think that is all.

Cross Examination

Mr. Scampini: Q. Just a few questions, Mr. White. You don't know anything yourself about these asked and bid prices, do you? A. No.

Q. You just know what you read in the book about it? [355] A. That is right.

Q. Does it necessarily reflect the reasonable value of the block of stock constituting more than 60 per cent of the outstanding issue of the company merely because somebody makes a bid for 100 shares?

A. I do not think I am qualified to answer that question.

Mr. Scampini: No further questions.

L. J. SPULLER, JR.,

called for defendants; sworn.

Direct Examination

Mr. Brownstone: Q. Mr. Spuller, with what firm are you associated?

A. Elworthy & Company.

Q. Is that a corporation? A. Yes.

Q. What position do you occupy?

A. Manager of their trading department.

Q. Does that corporation deal mainly in unlisted securities on the San Francisco market?

A. Yes.

Q. In response to our subpoena have you brought with you a record of the dealings of your corporation in preferred and common stock shares of the Merchants Ice & Cold Storage Company, a California corporation, and the 6½ bonds of that corporation during the year 1939 and 1940? A. Yes.

Q. Will you produce the records of the year 1940?

A. Yes. There are several years in one sheet.

Q. Are what you are now examining part of the official records of your company? A. Yes.

Q. And you use those records in the regular course of your business? A. Yes.

Q. They reflect the transactions at the time in your office? [356] A. Yes.

Q. From an examination of those records will you tell us what transactions were had by Elworthy & Company in preferred shares of Merchants Ice & Cold Storage Company during 1940?

(Testimony of L. J. Spuller, Jr.)

A. There were none in 1940.

Q. You say no transactions whatsoever in preferred shares of Merchants Ice & Cold Storage Company during 1940? A. No.

Q. How about during the year 1939?

A. Yes.

Q. Will you tell us the price of those securities?

A. November 15, 1939, there were 30 shares paid $11\frac{1}{4}$.

Q. Was that purchased or sold?

A. Sold. We acted as broker.

Q. What other transaction?

A. That was all in 1939.

Q. Going to the year 1941 what transactions did you have in preferred? A. None.

Q. None in the year 1941?

A. No, not preferred.

Q. Going to the common shares, were there any transactions in 1939?

A. Yes. On November 15 there were 210 shares at the price of $121\frac{1}{2}$ cents.

Q. $121\frac{1}{2}$ cents a share? A. Yes.

Q. Is that the sole transaction in 1939?

A. Yes.

Q. How about 1940?

A. 1940, March 14, 120 shares at 15 cents.

Q. Is that the sole transaction in 1940?

A. Yes.

Q. What transactions were had during 1941?

(Testimony of L. J. Spuller, Jr.)

A. April 1, 426 shares at 50 cents.

Q. April 1, 1941? A. Yes.

Q. Any other transaction? A. No.

Q. Now, going to the 6½ per cent bonds of Merchants Ice & Cold Storage Company, give the transactions in bonds had by Elworthy & Company for the year 1939. A. There were none.

Q. None in 1939? A. No. [357]

Q. Go to the year 1940. What transactions were had in 1940?

A. February 2, there were trades at 80 and 81.

Q. How many bonds were traded at that price?

A. 1,000. On October 23, 1,000 at 69 and 71.

Q. Purchased at 69 and sold at 71?

A. Yes.

Q. In other words, 2 points difference between the purchase and sale price?

A. Yes. That is all for 1940.

Q. How about 1941? A. There was none.

Q. No transactions at all in 1941?

A. No.

Cross Examination

Mr. Scampini: Q. Will you please state how many years of experience you have had in the trading department of an unlisted security house?

A. Since 1925.

Q. Have you always been associated with the same firm? A. The same firm since 1931.

Q. How long have you been with this firm?

A. Since the inception.

(Testimony of L. J. Spuller, Jr.)

Q. So you are acquainted with these particular transactions concerning which you have testified, are you? A. Yes.

Q. Now, in your experience as a trader in stock—as a result of years of training and experience can you state whether or not an occasional transaction of 100 shares or 200 shares of stock such as you have shown from your records necessarily reflects, in your opinion, the true reasonable intrinsic value of a block of stock representing more than 50 per cent of the outstanding capital stock and therefore carrying with it control of the company?

A. I could not say as to that, but I would say it represents the market at the time

Q. Does it reflect the market, or what somebody is willing to pay for 65,000 shares of stock, or what the true intrinsic [358] value of a block of more than 50 per cent of the shares?

A. I could not answer that.

Q. Is it not true that whenever stock is exclusively held by say one concern and only a few shares outstanding in the hands of the public, that the market for the publicly owned stock is generally very thin? A. Yes.

Q. And the bid and ask price sometimes has no relation to the true reasonable value of the stock, has it? A. It could be.

Q. Between what customers did these transactions that you have testified to take place that took

(Testimony of L. J. Spuller, Jr.)

place on November 15, 1939, I think, at 12½ cents?

Who bought that stock?

A. Lewis & Broy.

Q. Who are they?

A. A brokerage house.

Q. How about the next block in 1940?

A. The Pacific Empire Holdings.

Mr. Scampini: No further questions.

W. G. EVANS,

recalled for defendants; previously sworn.

Direct Examination

Mr. Naus: Q. Mr. Evans, you have been connected in business for many years with Mr. Henri and Peter Bercut, haven't you? Continuously since when? A. Since December, 1924.

Q. And you have had experience as an accountant and as an officer, have you? A. Yes.

Q. Trained as such? A. Yes.

Q. State to what extent you have had connection with the business affairs of Peter and Henri Bercut generally during that period of time.

A. Well, I *have an* assistant to Peter Bercut in the management of his affairs. [359]

Q. Have you charge of his personal records and accounts and his affairs generally?

A. Personally, yes.

(Testimony of W. G. Evans.)

Q. Along about February 1941 you became associated with the Merchants Ice & Cold Storage Company, did you? A. Yes.

Q. Mr. Bercut put you in there? A. Yes.

Q. What has been your connection with Merchants Ice & Cold Storage Company since February 1941? A. I have been manager.

Q. At the time you took charge did you take charge of the records and accounts of the company?

A. All that we have there at the office, yes.

Q. Have they been under your supervision?

A. Yes.

Q. Mr. Plagemann attends to the keeping of the accounts but under your supervision as manager?

A. Yes.

Q. You are familiar with those accounts?

A. Yes.

Q. Examine and study them from time to time?

A. Yes.

Q. Now, from time to time as Mr. Peter and Henri Bercut purchased stock and securities you kept a record of the purchases, didn't you?

A. Yes.

Q. At my request have you brought the details of the purchases of Merchants Ice & Cold Storage stock by Peter and Henri Bercut? A. Yes.

Q. Other than this stock bought on January 8, 1941? A. Yes.

Q. Now, will you state the date, quantity and price of the purchases of Merchants Ice & Cold

(Testimony of W. G. Evans.)

Storage Company stock by the Bercuts other than the purchase on January 8, 1941 from the Pacific Empire Holdings.

A. January 20, 1940, from Anthony De Voto, 800 shares of common stock at 50 cents a share.

Q. Next?

A. February 17, 1940, Schwabacher, 100 shares of preferred at \$1.75 a share.

Q. Next?

A. November 2, 1940, Hansford & Talbot, 250 shares [360] at \$1.75 per share.

Q. Next?

A. December 19, 1940, Lewis & Broy, 250 shares of preferred at \$1.50 per share.

Q. Next?

A. June 30, 1941, H. R. Baker & Company, 400 shares of common at 50 cents a share.

Q. Next?

A. April 3, 1941, Elworthy & Company 426 shares of common at 50 cents a share. April no date, M. Maffei, 400 shares of common at 50 cents.

Q. You have been sitting in the courtroom. That is the transaction to which Mr. Maffei testified the other day? A. I believe it is.

Q. Next?

A. June 3, Wulff Hansen & Company, 333 $\frac{1}{3}$ shares of common at 65 cents.

Q. That was June 1941, was it not?

A. June 1941.

Q. Next?

(Testimony of W. G. Evans.)

A. June 2, 1942, 300 shares of preferred at $2\frac{1}{2}$ per share. July 15, 1942, Hill Richards & Company, 100 shares at $3\frac{1}{2}$ per share. 1943, January 19, Elworthy & Company, 500 shares of preferred at \$5 a share.

Q. Next? A. That is all I have.

Q. That completes the list as far as you have any record of it? A. Yes.

Q. That is the entire list, as far as you know, of any purchases by Peter and Henri Bercut?

A. Yes.

Q. And did you have any record showing where purchases were made? A. Yes.

Q. So far as you know, there was no acquisition of any Merchants Ice & Cold Storage stock by the Bercuts prior to the first time you have mentioned there other than the one Mr. Bercut testified the other day that Mr. Scampini got for him from Vincent some years back; you have no record of that? A. No. [361]

Q. But aside from that, those are all the purchases that you know of? A. Yes.

Q. Now, at the time the negotiations for the purchase of the Pacific Empire Holdings were in progress, you were in touch with that matter for Mr. Bercut? A. Yes.

Q. He had you make an analysis of accounts and balance sheet of the Merchants Ice & Cold Storage Company? A. Yes.

Q. And any letter or letters he received from

(Testimony of W. G. Evans.)

Pacific Empire Holdings, from Mr. Arnold or otherwise, he turned over to you for custody at the time? A. Yes.

Q. There is in evidence here a contract dated January 8, 1941. You recall the original purchase contract of January 8, 1941, do you not, without stopping to refer to the exhibit? A. Yes.

Q. Now, sometime shortly thereafter did you receive other letters from Pacific Empire Holdings through Mr. Arnold with respect to this transaction and purporting to consummate it? A. Yes.

Q. Will you produce them, please. The fact of the matter is that the transaction was not completed on January 8, 1941, was it, Mr. Evans?

A. No.

The Court: We will take a short recess.

(After recess.)

Mr. Naus: During recess I have shown these to Mr. Scampini.

Q. This letter of January 14, 1941 you received in the ordinary course of business at that time, didn't you? A. Yes.

Q. That is Mr. Arnold's signature, is it?

A. I believe so.

Mr. Naus: I will offer this in evidence.

The Court: It may be admitted and marked.

(The letter was marked "Defendants' Exhibit I.")

(Testimony of W. G. Evans.)

DEFENDANTS' EXHIBIT I
PACIFIC EMPIRE HOLDINGS
Incorporated
26 O'Farrell Street
San Francisco

January 14, 1941

Mr. Peter Bercut
739 Market Street
San Francisco, California

Dear Mr. Bercut:

In accordance with the terms and conditions of our sale to you of certain shares of stock of Merchants Ice and Cold Storage Company, as referred to and agreed upon in our letter of the 8th, we are herewith delivering to you this date stock certificates aggregating 66,595 shares, in accordance with the certificates described on the attached delivery ticket.

There is attached hereto copies of our letters addressed to California Baking Company and Wm. H. Roussell, referring to the delivery of 5,516 $\frac{2}{3}$ shares and 700 shares Preferred stock, respectively, of Merchants Ice and Cold Storage Company, upon final payment of amounts owing by this company.

We have yet to deliver to you, pursuant to the conditions of our agreement above referred to, the total of shares.

In addition to the stock delivered, there are 2,000 shares Common stock registered in the name of Con Shea, evidenced by certificates Nos. 110, 111,

(Testimony of W. G. Evans.)

for 1,000 shares each. These certificates have never been in our possession even though they are owned by the company. A "Stock Transfer" has been on the books of the company for many years, and evidence of your ownership has now been placed on the stock records.

Yours very truly,

L. R. ARNOLD

Executive Vice-President

LRA/lk

January 15, 1941

Mr. Louis Sutter, Vice-President
Anglo California National Bank
#1 Sansome Street
San Francisco, California

Dear Sir:

Please be referred to our note in favor of California Baking Company, with balance due of \$3,900.00, secured by the pledge of 5,516 $\frac{2}{3}$ shares Preferred stock of Merchants Ice and Cold Storage Company.

When the balance due is paid to California Baking Company you are authorized and directed to deliver the collateral hereinabove referred to, to Mr. Peter Bercut.

May we ask that you kindly acknowledge this authorization by advice to Mr. Bercut?

Yours very truly,

L. R. ARNOLD

Executive Vice-President

LRA/lk

(Testimony of W. G. Evans.)

January 15, 1941

Mr. Wm. Roussell
152 Clay Street
San Francisco, California

Dear Mr. Roussell:

Please be referred to our obligation to yourself, with balance due of \$5,100.00, secured by 700 shares Preferred stock of Merchants Ice and Cold Storage Company.

Upon final payment of the balance due, you are hereby authorized and directed to deliver the collateral as hereinabove mentioned, to Mr. Peter Bercut.

May we ask that you kindly acknowledge this authorization by advice to Mr. Bercut?

Yours very truly,

L. R. ARNOLD

Executive-Vice-President

LRA/lk

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Defts. Ex. No. I. Filed 5-6-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

(Letter of January 31, 1941 from Arnold to Peter Bercut was marked [362] "Defendants' Exhibit J.")

(Testimony of W. G. Evans.)

DEFENDANTS' EXHIBIT J
PACIFIC EMPIRE HOLDINGS
Incorporated
26 O'Farrell Street
San Francisco

January 31, 1941

Mr. Peter Bercut
739 Market Street
San Francisco, California

Dear Mr. Bercut:

Confirming our conversations this date, there are certain shares of stock not yet delivered to you, to-wit:

# 17—150 shs.	M.I.C.S.—Preferred
#128— 25 “	“ —Common
#129— 25 “	“ — “
#139—241 “	“ — “
#141—100 “	“ — “
#146— 33 $\frac{1}{3}$	“ — “
#149—333 $\frac{1}{3}$	“ — “
#157—597 shs	“ — “
#162—120 “	“ — “

1,624 $\frac{2}{3}$ shs.

pursuant to our agreement of January 8, 1941.

Please know that we will immediately deliver this stock as soon as it is obtained from the present holder, if not additional stock will be purchased on the market, in order to make up any existing dif-

(Testimony of W. G. Evans.)

ference in the number of shares delivered to date, and those mentioned in the letter above referred to.

Yours very truly,

L. R. ARNOLD

Executive Vice-President

LRA/lk

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Deft's Ex. No. J. Filed 5-6-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

Mr. Naus: Q. Referring to this letter which is dated January 31, 1941, Defendants' Exhibit J, did Pacific Empire Holdings ever subsequently deliver to you the shares they therein promised?

A. No.

Q. Now, have you at the request of Mr. Brownstone prepared a detailed summary or memorandum of all the certificates and shares of common and preferred stock received from Pacific Empire Holdings, and can you produce that and tell us the number of shares of common and the number of shares of preferred respectively that were to come to you in the deal, the number of shares you received, and the number of shares you are still short on the deal?

Mr. Naus: Would you like to look at the memorandum first, Mr. Scampini? (Handing paper to counsel.)

(Testimony of W. G. Evans.)

Q. Mr. Evans, so far as the custody of the records of this deal is concerned, you personally had complete charge of it, didn't you? A. Yes.

Q. What you have here is a summary prepared by you from the immediate records of the stock certificates of preferred and common shares received, and it is a true and complete summary, is it not? A. It is true and complete.

Q. Now, with respect to the common shares, what was the quantity of common shares that were to come to you on the deal?

A. 65,863 shares.

Q. How many did you actually receive?

A. 62,341.

Q. How many shares of common are you still short on the deal, never delivered to you?

A. 3,522.

Q. Now turning to the preferred, what was the quantity of preferred shares that were to come to you on the deal, to Mr. Bercut? [363]

A. 12,495 shares of the preferred.

Q. How many shares of preferred actually came to you? A. 12,186 $\frac{2}{3}$ shares.

Q. How many shares of preferred are you still—that is, Mr. Bercut—still short on the deal?

A. 308 $\frac{1}{3}$ shares.

Q. Now, in respect to the shares that were actually received did not one or the other of the Bercuts have to pay out some money over and above the \$35,000 in order to get the share certificates?

(Testimony of W. G. Evans.)

Q. You recognize this canceled check, do you, Mr. Evans? A. Yes.

Q. You know what it was given for, don't you?

A. I beg your pardon?

Q. Do you know what the check was given for?

A. The check was given to the Pacific Empire Holdings, Inc.

Q. For what purpose?

A. For the purpose of releasing 5,000 and some-odd shares of the preferred at the Anglo Bank.

Q. In other words, that was supposed to be part of the deal; they were held at the Anglo Bank and they would not let go of them until they were paid; is that correct? A. Yes.

Q. Did it take that amount of money to get the shares? A. That is right.

Q. And did that transaction occur as of the date of that check, in other words, the check is truly dated? A. Yes.

Mr. Naus: I offer the check in evidence.

The Court: It may be admitted and marked.

(The check was marked "Defendants' Exhibit K.")

(Testimony of W. G. Evans.)

DEFENDANTS' EXHIBIT K
FRENCH-AMERICAN BRANCH
BANK OF AMERICA
National Trust & Savings Association

No.....

San Francisco, Calif.

April 10, 1941

Pay to the Order of Pacific Empire Holdings
Inc. \$3950.00

Thirty-nine hundred fifty and 00/100 Dollars

HENRI BERCUT

(on reverse)

Pacific Empire Holdings Inc. A. A. Kern, Tres.
L. Keener, Asst. Secy, for Deposit.

California Pacific Service, Inc. A. A. Kern, Tres.

39 Paid through Clearing House or Pay to the or-
der of any Bank or Trust Co. Prior endorse-
ments guaranteed. Apr. 12 1941 Pacific National
Bank of San Francisco 11-39

[Endorsed]: Defts. Ex. No. K. Filed 5-6-43.
Walter B. Maling, Clerk. J. P. Welsh, Deputy
Clerk.

Mr. Naus: Q. What bank is that drawn on?
That is a Bank of America check with "French
American Branch" written above.

A. That is the French American Branch of the
Bank of America. [364]

(Testimony of W. G. Evans.)

Q. That money, as I understand it, was paid by Henri Bercut to Pacific Empire Holdings, who in turn turned it over to the bank and got the stock?

A. Yes.

Q. Did the Pacific Empire Holdings ever pay back to Henri Bercut that money? A. \$100.

Q. So that the Bercuts are still out \$3,850 over and above the \$35,000? A. Yes.

Q. I hand you Defendant's Exhibit C, the balance sheet of Merchants Ice & Cold Storage Company of December 31, 1940, Mr. Evans. Now, you have compared that balance sheet in detail with the account books of Merchants Ice & Cold Storage Company, have you not, studied it in detail, all the items on it? A. Yes.

Q. And where a total is shown under a heading, you have gone to the books and found out the individual items that that total breaks down into, haven't you? A. To a great extent, yes.

Q. Now, taking that balance sheet, you find a heading, "Accounts Receivable \$134,219.78." You find that, do you not? A. Yes.

Q. Did you or not find upon an examination of the details of that item whether a substantial amount of that appeared to be uncollectible and was written off? A. Yes.

Q. Will you identify the separate, individual items of this accounts receivable and name any account that was an uncollectible item and had been written off as loss.

(Testimony of W. G. Evans.)

A. Frostcraft Corporation, \$11,056.44; W. A. Sherman account, \$9,595.15.

Q. Frostcraft Corporation how much?

A. \$11,056.44.

Q. Was there Globe Brewing Company receivable in there? A. No.

Q. Was there any Pacific Empire Holdings receivable in there? A. \$35,949.29. [365]

Q. Is that Pacific Empire Holdings or Pacific Empire Corporation? A. I don't know.

Q. You don't recall at the moment?

A. No.

Q. It is one of the two? A. Yes.

Q. Was there a San Francisco Fruit Company item there? A. Yes.

Q. How much? A. \$1,617.26.

Q. As I understand it, then, these items that you have now stated by name of the debtor and amount were included in the accounts receivable of the Merchants Ice & Cold Storage Company as of December 31, 1940 and turned out to be worthless? A. That is right.

Q. Now, with respect to the accounts payable—you find under current liabilities a subheading of "Accounts Payable, \$30,462.24." Can you tell me, please, how much, if any, of that was an amount or overdue amount owing to the Pacific Gas & Electric Company at that time?

A. Yes, they owed Pacific Gas & Electric Company \$11,341.62.

(Testimony of W. G. Evans.)

Q. That was for what—power? A. Power.

Q. And that was an accumulation of about how many months, that power bill?

A. Four months.

Q. Did you find that there was any difficulty with the P. G. & E.? Did you find that the file contained any correspondence showing any threat from the P. G. & E.? A. No actual threat.

Q. Was there any threat of discontinuance of service that you know of?

A. Mr. Plagemann informed me there were.

Q. In that balance sheet of December 31, 1940, on the liabilities side, what did you find from an examination of the books with respect to the status of taxes, property taxes owing to the City and County of San Francisco? It shows here current [366] liabilities, taxes payable to City and County of San Francisco, \$25,000. A. \$25,704.73.

Q. Was there any of that delinquent that was not paid up to date?

A. The December installment had not been paid.

Q. How much does that amount to?

A. Somewhere in the neighborhood of \$11,000.

Q. Now, separate and apart from the liabilities shown on the balance sheet, did or did not the Bank of America make claim or was it making a claim somewhere toward the end of 1940 in connection with butter receipts? A. Yes.

Q. What amount were they claiming?

A. \$38,477.79.

(Testimony of W. G. Evans.)

Q. That is not included in the balance sheet, is it?
A. No.

Q. Now, after Mr. Bercut took over the management was or was not a settlement finally made with the Bank of America after an investigation and discovery that they were holding receipts that had no butter behind them?
A. Yes.

Q. Under Mr. Bercut's management how much was actually paid to the Bank of America to settle that butter claim?
A. \$22,000.

Q. Now, state whether or not a man by the name of Sozzo was making a claim against the Merchants Ice & Cold Storage Company, a claim not recorded as a liability on the balance sheet?
A. Yes.

Q. What is the amount of that claim?

A. \$43,000 in principal amount and \$10,000 in interest, attorney's fees.

Mr. Naus: I will lead on that.

Q. The Merchants Ice & Cold Storage Company filed in the State Court, and there is still pending in the State Court, a suit to foreclose the mortgage against the Globe Brewing Company and in connection with that claim that I mentioned Sozzo put in [367] a cross-complaint seeking \$42,000 damages against the Merchants Ice & Cold Storage Company and others, and that is still pending and at issue and undecided in the State Court.

Mr. Scampini: Correct.

Mr. Naus: Q. Whether there is anything due or not is undetermined, but that \$42,000 claim is

(Testimony of W. G. Evans.)

still pending in court and not included in the balance sheet; isn't that correct? A. Yes.

Q. Now, Mr. Evans, would you tell me, please, from your examination of the Merchants Ice & Cold Storage Company records that came into your possession what was the last year before the year 1941 in which the Merchants Ice & Cold Storage Company operated at a profit? A. The year 1930.

Q. And in every year subsequent to 1930 and prior to 1941 it operated at a loss, didn't it?

A. Yes.

Q. And the books disclose what was the aggregate amount of annual losses of the Merchants Ice & Cold Storage Company operations from and including the year 1931 to and including the year 1940? A. What is the aggregate?

Q. From and including 1931 and including 1940.

A. \$543,501.25.

Q. Now, you have given us the aggregate. Will you give us the amount for each year beginning with year 1931 as the first year, and ending with the year 1940?

A. 1931, \$47,517.09; in the year 1932, \$146,600.46; in the year 1933, \$90,413.95; in the year 1934, \$36,791.86; in the year 1935, \$38,575.89; in the year 1936, \$75,114.59; in the year 1937, \$8,424.03; in the year 1938, \$128,285.18; in the year 1939, \$17,762.76; in the year 1940, \$54,014.44.

Q. The amount you have given year to year is the loss for each [368] of those years, is that correct? A. Yes.

(Testimony of W. G. Evans.)

Q. Now, Mr. Evans, when did the turnover of Merchants Ice & Cold Storage Company actually take place?

A. You mean when the money passed?

Q. Well, no, when the shares were delivered and you were actually put in possession. When was Mr. Bercut actually put in possession?

A. February 1, 1941.

Q. Now, when you took possession you found practically no cash on hand; isn't that the fact?

A. Yes.

Q. Can you tell offhand about how much?

A. Around \$2,000.

Q. Around \$2,000? A. Yes.

Q. Now, at the time you took possession what did you find were the immediate needs and requirements of Merchants Ice & Cold Storage Company for a period of approximately a year from the time of taking possession? Will you give the items like interest and taxes?

A. We were faced with the outlay of cash for the interest on April 1, 1942.

Q. That was due under the bond issue?

A. Under the bond issue.

Q. Semiannual interest?

A. Yes, \$21,433.75. Taxes April 20, 1941——

Q. Taxes that had to be paid on April 19, 1941?

A. \$25,704.75. Interest October 1, 1941, \$21,-433.75. Taxes December, 1941, installment, estimating no interest, \$25,704.75. Interest April 1,

(Testimony of W. G. Evans.)

1942, \$21,433.75. Retirement of the bonds, April 1, 1942, \$40,000. Insurance expiring 1941 approximately \$5,000 premium. A total of \$162,710.71.

Q. So that for the period of the next thirteen or fourteen months immediately after taking possession it was necessary for the Bercuts to see to the provision of cash in the amount of \$163,000 over and above the ordinary business operating [369] expenses; that is correct, is it not? A. Yes.

Q. And did the Bercuts or not provide that cash, and were those paid?

A. We were short at the time of the retiring of the bonds in the sum of \$18,000.

Q. Did or did not the Bercuts from their personal funds send money to the Merchants Ice & Cold Storage Company to meet those obligations such as you have described as they fell due and as money was needed to do it? A. Yes.

Q. Now, as manager of that plant beginning February 1, 1941, I assume that you went through and examined the plant, the physical condition?

A. Yes.

Q. Would you describe to his Honor in a general way but sufficiently fully to intelligently give him a description of the physical condition of the plant at the time it was turned over to the Bercuts?

A. Well, starting with the roof, the roof of the buildings was in very poor shape, and during the year 1941 we did not have the money to do much repairing to them at all. In 1942 we spent large sums repairing the roof.

(Testimony of W. G. Evans.)

Q. "Large sums" is more or less meaningless. Will you itemize it?

A. Approximately \$6,000 to \$10,000. When the roof leaks in a cold storage house like that the water comes down into the insulation between the walls and ruins the insulation; and the coils, pipes in the refrigerator room are very old, pitted, and many leaks in them. We had to spend large sums and are still spending them to fix the insulation and the coils. And in the walls of the building you can see breaks, and the mortar between the bricks has disintegrated. The floors due to leaks from the coils are very bad, and we are continually looking after the floors, after the roof and [370] the coils and the equipment. The Globe Brewing Building, what used to be the Globe Brewing Building, we fixed over; we gunnited it. That was affected by termites. We had to spend, to make that building satisfactory, in the neighborhood of \$30,000.

Q. What would you say would be the approximate aggregate of money that had been spent since the Bercut management took hold in 1941 in an endeavor to repair and renew the physical plant, the buildings, equipment and so on?

A. I think probably \$100,000 already.

Q. You have spent already \$100,000?

A. Yes.

Q. Have you work in progress right now?

A. Right now we are committed to probably \$200,000 or \$250,000 more.

(Testimony of W. G. Evans.)

Q. In other words, you have spent about \$100,000 to put the plant in shape and you are committed by contract to put \$200,000 in addition to that in to put the plant in shape?

A. It will take another \$250,000 before we get it in anything like the shape that the Bercuts like to have in operating plants.

Q. You have already spent roughly \$100,000 for repairs of the plant since the Bercuts took it over, and in addition to spending \$100,000, you are actually presently committed to about \$200,000 more?

A. Well, maybe \$150,000 more.

Q. Then over and above those two items, as part of the further program, as time goes on, you believe it will take at least a quarter of a million to put the plant in proper shape? A. Yes.

Q. Will you tell me the total gross sales or revenue of Merchants Ice & Cold Storage year by year for the last five or six years, for the years you have got together for me, giving it by year, and the amount of gross sales of storage space and gross revenue?

A. The total revenue for the year 1937 [371] was \$436,097.78.

Q. That is what you received from customers in payment of all operations?

A. That is our gross sales from all sources.

Q. From the gross operations. Go ahead with the next year. A. 1938, \$354,688.

Q. Next? A. 1939, \$386,404.86.

(Testimony of W. G. Evans.)

Q. Next?

A. 1940, \$371,350.85. 1941, \$453,599.26. 1942, \$845,647.57.

Q. Now, as a matter of fact, the year of 1942 ended up with good operating results, largely, did it not, through the practically doubling of the gross business?

A. Yes.

Q. Now, in jumping up the gross business done by that company for the year 1942 to something over \$800,000 a year, did or did not Mr. Peter Bercut go out into the trade and bring in new business?

A. Yes, he did.

Q. Now will you indicate to his Honor by names of customers the six or eight largest new customers he brought in, and with respect to each one about the annual amount of business that he brought in.

A. I will take the large figures first. Swift & Company did business with us in 1940 of \$21,428.89.

Q. You mean that is an increase in business?

A. No, that was the revenue from Swift & Company in the year 1940.

Q. Go ahead.

A. In 1941 it was \$40,654.09; in 1942 it was \$23,-644.81. Armour & Company in the year 1940, we had a gross revenue from them of \$1,482.09; in 1941 we had \$5,134.96; in 1942 we had \$9,757.16. Cudahy Packing Company, we had no business with them in 1940, and business from Cudahy in 1941 and 1942 amounted to \$16,652.89. Wilson & Company, another meat packer, never did any business with the

(Testimony of W. G. Evans.)

Merchants Ice & Cold Storage Company until the Bercuts came there, and the [372] business of Wilson & Company during the two years was \$2,316.75. Swanson & Company, meat packers, \$37,376.72.

Q. That is new business?

A. That is new business. And there is a small amount of \$24.72. There was an increase in business from Swift and Armour and new accounts with the other large packers amounting to \$135,570.12.

Q. Gross business?

A. Gross business. The following never did business with the Merchants Ice & Cold Storage Company until Peter Bercut solicited them: Bercut-Richards Packing Company, \$3,353.79; Sutter Packing Company, \$314.48; F. E. Booth Company, \$14,941.85; Oakland Canning Company, \$1,605.81; Pratt-Low Company, \$174.63; Heinz & Company, \$2,409.25; Hunt Bros. Packing Company, \$1,454.59; Sweitzer & Company, \$1,217.52. None of these had done any business during 1940—maybe sooner than that, but during 1941 and 1942 there was an increase in business from them of \$25,550.72.

Q. Have you stated the main new customers now or not?

A. That is the main contracts with meat packers and with the canneries. There were other new accounts that have taken place since.

Q. Mr. Evans, I forgot to ask you when you came to court whether you could break the balance sheet down in buildings, machinery and equipment,

(Testimony of W. G. Evans.)

into the three separate items included under that.
Can you do that?

A. I think I have a breakdown.

Q. You remember the balance sheet started out with an item of something above \$2,000,000 before depreciation, and then after giving effect to depreciation of two years it has come down to something like \$1,000,000; but I would like to find out how that \$2,000,000 was broken into separate items of buildings, machinery and equipment.

A. The way it is [373] broken down on the books on the plant account of 1940, the buildings were carried at \$1,409,426.95.

Q. That is the buildings before depreciation?

A. That is shown on the books.

Q. Next?

A. Machinery and equipment \$858,505.30.

Mr. Naus: You may cross-examine.

Cross Examination

Mr. Scampini: Q. Mr. Evans, let us take the actual items first. You say that is the value at which the buildings were carried in 1940? A. Yes.

Q. What is the aggregate amount of the buildings and machinery? A. \$2,284,365.54.

Q. Upon what basis or what formula were those buildings and improvements and machinery carried? How was the figure arrived at?

A. I understand they were originally set up on the 1927 appraisal.

(Testimony of W. G. Evans.)

Q. All right. I will show you here a summary of the American Appraisal Company. If I understand your testimony correctly, you stated you are a certified public accountant by profession?

A. No, not certified.

Q. Are you an accountant? A. Yes.

Q. A bookkeeper?

A. Yes, I am a bookkeeper.

Q. Have you examined the American Appraisal Company's appraisal of this property?

A. No.

Q. So you would not care to testify with respect to the exhibit that I am now showing you, which is Plaintiff's Exhibit 30? A. No.

Q. You don't know whether these buildings, improvements and equipment were appraised by the American Appraisal Company in 1927 on two bases, that is, cost of reproduction and the [374] sound value basis?

A. I have glanced it over, but I don't know much about it.

Q. Now, as against that aggregate figure are you in a position to state whether or not that is the reasonable value of buildings and improvements, machinery and equipment, the figure you just testified to? A. No.

Q. You would not yourself know, would you?

A. No.

Q. Do you know how much depreciation has been taken or set up? A. \$1,336,625.18.

(Testimony of W. G. Evans.)

Q. What is the net carried value of the buildings, machinery and equipment as of 1940?

A. \$947,743.36.

Q. Now, you testified concerning ten years when the company's loss fluctuated anywhere from \$8,000 for a year to one year as high as \$100,000 and some-odd, and beginning with 1930 and ending with 1940, a ten-year period, if I follow your testimony, it was to the effect that approximately \$540,000 was the aggregate loss; is that correct?

A. That is what I got from the statement.

Q. Now, do you know whether or not between 1930 and 1940 new capital was put into this company?

A. Not as far as I know.

Q. Will you please state how much the company had outstanding on its bond issue on January 1, 1930?

A. 1930?

Q. Yes. A. I would not know.

Q. Do you know how much it had outstanding on January 1, 1941?

A. Yes, I think it was \$659,500, was it not?

Q. And do you know that between January 1, 1930 and December 31, 1936 more than \$250,000 in bonds were retired in this company?

A. No. I did not pay any attention to 1936.

Q. As a matter of fact, whatever was retired from this bond issue—and of course your books will disclose it—I think [375] was \$250,000, if I correctly remember the figure—that was paid out of the operations of this company, wasn't it?

(Testimony of W. G. Evans.)

A. I would not know.

Q. No new capital was put in?

A. Well, there might have been some borrowing; I couldn't say.

Q. Do you know what the current liabilities or total liabilities of the company as of January 1, 1930?

A. No, I don't know anything about that far back.

Q. You don't know whether after incurring a loss, as you say, of \$500,000 and some-odd the liabilities of the company were less or more at the end of this ten-year period? A. No.

Q. When you say that this company suffered a loss of \$540,000 for the ten-year period, of course you mean after having taken in excess of \$700,000 of depreciation during this ten-year period, don't you? Depreciation in this case is the equivalent of cash, is it not? A. Not necessarily.

Q. You have buildings and improvements that you depreciate during the year, say, at the average sum of \$75,000, and from an accounting point of view you are supposed to have \$75,000 that you have taken by way of depreciation, aren't you?

The Court: I think the record already discloses that.

Mr. Scampini: Q. And if you take the amount of net loss which you have testified to from the aggregate amount of depreciation, is it a fair statement to say or to make that there was practically

(Testimony of W. G. Evans.)

\$200,000-odd more in depreciation taken in this ten-year period than the loss that was actually incurred after depreciation?

Mr. Naus: That is argumentative.

Mr. Scampini: Q. You said that there was charged off \$11,000 on the Frostrcraft Corporation.

A. Yes. [376]

Q. Do you know anything about the transaction whereby 500 shares of stock were purchased in Frostrcraft by Peter and Henri Bercut?

A. Yes.

Q. Will you tell us all those facts?

A. The Allied Products Company owed Merchants on storage.

Q. How much?

A. \$5,000. They would not pay, apparently, and they had some difficulty about their stock, and Peter Bercut gave Allied a check for \$5,000 in payment for the stock, and Allied in return paid their bill to Merchants in the sum of \$5,000.

Q. In effect Mr. Peter Bercut's object was to have 500 shares of stock in the Frostrcraft Corporation?

A. Yes.

Q. You mean to say that you charged that off accounts receivable as uncollectible?

A. Yes.

Q. Why did you charge it off as uncollectible?

A. Because they could not collect.

Q. You mean because the company was insolvent?

A. Well, you couldn't collect it.

Q. When did you charge it off? After the stock was delivered to Peter Bercut or before?

(Testimony of W. G. Evans.)

A. Before, at the end of 1941.

Q. When did Peter Bercut acquire the stock

A. In 1942.

Q. By that time the Frostrcraft Corporation had improved its position?

A. In 1942 the Frostrcraft condition was they were able to pay their current bills. They have not paid anything on the old indebtedness.

Q. Will you please give us the acquisitions made by Peter Bercut of bonds of the Merchants Ice & Cold Storage Company just as you have given us the acquisition of common and preferred stock? Have you that? A. No.

Q. Will you do that and have it here in the morning? [377] A. I will try.

Q. When did Mr. Bercut start to acquire stock in the Merchants Ice & Cold Storage Company and actually accumulate it?

A. I think the first he got was the 2,000 shares.

Q. I mean, when did he actually start picking it up in the market, in 1938 or 1939, if I remember your testimony?

A. He bought some from DeVoto in January 1940.

Mr. Naus: The earliest date he testified to was in January 1940.

The Court: He has a memorandum on it.

The Witness: Do you want it?

Mr. Scampini: Q. No, your best recollection. How did he acquire this stock; how did he begin to acquire it? What would he do?

(Testimony of W. G. Evans.)

A. Why, pay cash for it.

Q. Would he put bids in on the market?

A. No.

Q. How did he happen to get it?

A. Some of the brokers called him up and said, "I have some Merchants Ice & Cold Storage," and they wanted so much for it.

The Court: His testimony was they called him up and solicited.

The Witness: Yes, they solicited him.

Mr. Scampini: Q. It is true, is it not, that there were only two places where Merchants stock could be disposed of, with Peter Bercut and Henri Bercut?

A. I would not know.

The Court: How do you mean?

Mr. Scampini: I mean, if anyone wanted to dispose of stock in the Merchants Ice & Cold Storage Company, there were only two points of interest, Peter Bercut and Pacific Empire Holdings.

The Court: One of the witnesses said that these brokers [378] can make a market.

Mr. Scampini: It may be, your Honor, but they make their own market without relation to——

The Court: Nevertheless it is due to action by themselves.

Mr. Scampini: Q. You say that when Peter Bercut went into business there in 1941 you had to find means of raising some \$100,000 to meet obligations for 1941?

A. \$161,000.

Q. The company met its obligations, did it not?

(Testimony of W. G. Evans.)

A. No, I stated on retiring the bonds they borrowed money from him personally.

Q. Is that the only time they had to borrow money from Peter Bercut? A. I believe so.

Q. How much did they borrow?

A. \$18,000.

Q. Would that be in 1942? A. Yes.

Q. Not in 1941? A. Not 1941.

Q. But the company paid off its own obligations from its operations, did it not? A. Yes.

Q. Has Mr. Peter Bercut been paid off all the obligations for the company that he loaned?

A. Yes.

Q. For how long a period of time did he loan the company this \$18,000?

A. I think it was two or three months.

Q. Did he take a note for the indebtedness?

A. I believe he did.

Q. Did he charge interest for the advancement?

A. Yes.

Q. What rate? A. Four per cent.

Q. Now, during 1941 you say that the company found it necessary to spend a large sum of money?

A. In 1941?

Q. In 1942, for repairs and rehabilitation.

A. Yes.

Q. Have you any idea of the aggregate amount that it expended during 1942 for repairs and rehabilitation?

A. I mentioned [379] the sum of \$100,000.

(Testimony of W. G. Evans.)

Q. That was paid out of the operations of the company, was it not? A. Yes.

Q. Out of its own earnings, is that right?

A. That is right.

Q. Now, as a matter of fact, you found it also necessary to expand your facilities to accommodate the increasing volume of business, didn't you?

A. Not yet.

Q. But some of the rehabilitation was for the purpose of accommodating the increased requirements of the business, wasn't it?

A. I don't think so.

The Court: Q. What about that Globe building?

A. That was an old building.

Mr. Scampini: Q. In connection with the new business, I notice that you mentioned as one of the new customers the Bercut-Richards Packing Company. A. That is right.

Q. That is Mr. Bercut's own company, is it not?

A. That is a corporation in Sacramento.

Q. He had that long before he ever acquired this block of stock? A. Yes.

Q. He was director of the Merchants Ice & Cold Storage Company for a couple of years before he acquired this stock, wasn't he?

A. I think he was.

Q. There was no reason in the world why the business of the Bercut-Richards Packing Company could not have been acquired by the Merchants Ice

(Testimony of W. G. Evans.)

& Cold Storage Company prior to his acquisition of this block of stock, was there?

A. It is quite a distance to come down, inconvenient.

Q. Before Mr. Bercut acquired this block of stock they did not do it because it was inconvenient, but when Mr. Bercut acquired the controlling interest in Merchants Ice & Cold Storage Company [380] they overlooked the inconvenience end of it?

A. They wanted to help Merchants out.

Q. All of the obligations of Merchants Ice & Cold Storage Company which had to be met in the year 1941, bearing in mind Mr. Bercut took over the management February 1, 1941, were all met on the due date, weren't they?

A. Not all of them, no.

Q. But you had no difficulty in arranging with your creditors to defer some of them until you could probably meet them?

A. On Peter Bercut's guarantee.

Q. What did he guarantee besides the bank account?

A. Well, for a while there I made personal statements for him and his brother to try to boost their trade and their confidence in him personally.

Q. You say you made personal statements. Is that the extent of the guarantee?

A. To show that there was something back of the house.

Q. They did some \$370,000 of business in 1940?

(Testimony of W. G. Evans.)

A. Yes. When Peter Bercut first came in, everybody was afraid to put their merchandise in there.

Q. They did how much business in 1941— \$470,000? A. Yes.

Q. It increased approximately \$100,000 over 1940, is that right?

A. Yes. They were waiting to find if Mr. Bercut was going to put anything in there.

Q. Did Mr. Bercut put anything in there?

A. He guaranteed everything behind it.

Q. What did he guarantee besides the bank account? A. Isn't that enough?

The Court: Q. What amount was that?

A. Around \$100,000.

Mr. Scampini: Q. That was over at the Pacific National Bank? A. Yes. [381]

Q. What else did he guarantee?

A. He gave his own personal statement, saying he would be personally responsible for the merchandise in the Merchants Ice & Cold Storage Company.

Q. Did he sign any guarantee?

A. I don't know about signing, but he gave his personal assurance.

Q. He just gave his personal assurance?

A. When he said, "The Merchants will be all right," there were men up there every week checking things; they were afraid that they would not be.

Mr. Scampini: Might I ask the indulgence of the Court to permit Mr. Hubner to ask a few questions on cross-examination?

(Testimony of W. G. Evans.)

The Court: Certainly.

Mr. Hubner: Q. Mr. Evans, you were in court when Mr. Bercut testified the other day?

A. I have been here most of the time.

Q. You heard his testimony, you heard the testimony of him entirely?

A. I believe I heard most of it.

Q. Did you hear testimony that he gave that the statements that were furnished him by Mr. Arnold concerning the Merchants Ice & Cold Storage Company were given by him to you for examination?

A. Yes.

Q. I believe his description was they were phony; I believe that was the word he used.

A. I probably made that statement because I was trying to get him out of it all the time.

Q. You advised him these statements were incorrect and they were made to conceal information rather than accurate?

A. I took a glance at the accounts receivable and the liabilities and I said to keep out of this thing.

Q. Mr. Bercut made the statement that you said that they were phony. Did you hear him say that?

A. He might have used that word "phony," but by "phony" I mean shaky. [382]

Q. You are general manager down there, aren't you?

A. Yes.

Q. The statements covering the years 1941 and 1942, were they prepared under your supervision?

A. Yes.

(Testimony of W. G. Evans.)

Q. And how are those statements? Are they true and correct statements of the condition of the company?

A. Well, they are a continuation of what we started with.

Q. In other words, these statements do not correctly represent the facts?

A. That I don't know. I carried the same assets right along just as was done before, as far as value is concerned.

Q. You are talking about the value of the physical assets? A. Yes.

Q. How about the other assets on the balance sheet? A. What do you refer to now?

Q. I am referring to the accounts receivable.

A. The accounts receivable are good now compared to what they were before; that is, as good as they could be.

Q. Now, as a matter of fact, you never made any addition to the reserve for the bad debts for the last two or three years, did you? A. No.

Q. Not at all? A. No.

Q. The reason you have not made any addition to the reserve for bad debts is the reserve was considered more than adequate to cover the bad accounts? A. Yes, we think so now.

Q. You say you think so now. You have made no change in it?

A. No, we have not changed it. We carry things just the same. When you have claims for something

(Testimony of W. G. Evans.)

like that, your accounts receivable are gone out of the window if your trade is bad.

Q. How about your other assets down there, the assets shown in the balance sheet? Take a look at it if you would like to. A. 1942? [383]

Q. Yes, 1942.

The Court: Direct his attention to whatever you have in mind.

Mr. Hubner: Q. Now take the current assets on the balance sheet. Are those all true and correct?

A. Yes.

Q. The next classification is investment?

A. Yes.

Q. You verified the existence of those accounts. They are carried at a fair value?

A. That I do not know. They are carried as they were before, land and property and everything else.

Q. So the statement that you are using in fact is, in your opinion, correct only if the preceding statements are correct as rendered by the Empire Holdings Company?

A. No, by that I mean there is no change in the asset value. You can't make any change without correcting it.

Q. You have written off all of the things you considered worthless, haven't you? A. Yes.

Q. And in 1941 you charged off how much for bad debts? Will you look at the statement?

A. Do you want a list of the bad accounts charged off in 1942?

(Testimony of W. G. Evans.)

Q. In 1941. Will you take a look at that?

A. I can give it to you from the income tax statement.

Q. You made a charge there on operating expenses in 1941 of \$21,000 for uncollectible bills, didn't you? A. Yes.

Q. You also made a charge down there for uncollectible notes of \$13,000? A. That is right.

Q. Did those represent Pacific Empire Holdings notes? A. No, I gave you that.

The Court: I assume you have gone into the books fully for all purposes. In fact, I think we have spent entirely too much time on this. If there is any particular item you have in mind, [384] you might question him.

Mr. Hubner: Just one more question.

Q. What was the total adjustment that you wrote off during the years 1941 and 1942 to cover all these worthless assets on the balance sheet?

A. I think the income tax return will show that.

The Court: I think we have a record of it, if there is any question about it. We will take an adjournment now until tomorrow morning at ten o'clock.

(Thereupon an adjournment was taken until Friday, May 7, 1943, at 10:00 a.m.) [385]

Friday, May 7, 1943—10:00 A. M.

Mr. Naus: Have you finished with Mr. Evans?

Mr. Scampini: Yes.

Mr. Naus: You asked him about the bonds.

Mr. Scampini: We waive it.

WEBB RICHARDS,

called for defendants; sworn.

Direct Examination

Mr. Brownstone: Q. Mr. Richards, what is your present address?

A. 1943 Rosecrest Drive, Oakland.

Q. What business are you engaged in?

A. Dehydrating vegetables.

Q. On or about August 20, 1942, you were a director in Pacific Empire Holdings, Inc., were you not? To refresh your recollection, that is the day of the meeting held in Mr. Scampini's office of the directors of that corporation. A. 1942?

Q. Yes. A. Yes.

Q. And ever since that time you have been and now are a director of that corporation?

A. Yes. The corporation has been in receivership.

Q. But you have never resigned as a director?

A. No.

Q. So that you are now a director of that corporation? A. Yes.

Q. Your first connection with Pacific Empire Holdings occurred in connection with what transaction?

(Testimony of Webb Richards.)

A. Well, my first connection was many years back. I could not mention just the date, where I was requested by Mr. Arnold to assist him in refunding some of the bond issues of the Merchants Ice & Cold Storage Company.

Q. To refresh your recollection, that was in the year 1936 or [388] 1937, was it not?

A. Approximately.

Q. At that time you were associated with the investment firm of Stephenson Leydecker?

A. That is right.

Q. Your firm, mainly through your efforts, was instrumental in securing an extension of the bond indenture of the Merchants Ice & Cold Storage Company in 1937; that is correct, is it not?

A. That is correct.

Q. At that time the firm of C. H. Rollins had threatened to foreclose the bonds and Stephenson Leydecker gained the consent of sufficient bondholders to put through the reorganization plan?

A. That is not quite correct.

Q. What is correct?

A. There was a man—I can't remember his name—who at that time was trust officer of the Crocker Bank, who is now residing in San Quentin, I believe. There were certain technical violations there, and there was some trouble came up, and so we started to solicit the bondholders for consent to reorganization, and then some of the other houses—C. H. Rollins, who had been the origi-

(Testimony of Webb Richards.)

nal underwriters, stepped into the picture and wanted to carry the thing through, and we made an arrangement with them for the reorganization and we instituted it.

Q. Subsequent to that date, as the minute book of the Pacific Empire Holdings shows, on or about February 15, 1938, you were elected a director of the holding company? A. Yes.

Q. And subsequent to that time you attended an occasional meeting approximately once a year of the stockholders of that corporation?

A. That is correct.

Q. Now, where was your office subsequent to February 15, 1938?

A. Well, that is a difficult question to answer for the reason that I had been engaged in reorganization work of several [389] companies and I maintained an office from 1938, I was doing work for the Pacific Empire, and I believe had started on the Frostrcraft Corporation, and also was doing some work for the truck line and had offices at 242 Second Street. [390]

Q. In connection with the reorganization of the truck line, that reorganization was completed?

A. That was completed.

Q. On or about November, 1940, is it or is it not a fact that you at least occupied a portion of your time at the office of the Pacific Empire Holdings? A. That is correct.

(Testimony of Webb Richards.)

Q. Is it or is it not a fact that on or about November, 1940, Mr. Arnold requested you to interest any person whom you could interest in the purchase of the stock of Merchants Ice & Cold Storage Company then owned by Pacific Empire Holdings?

A. Mr. Arnold and I discussed for some time, the date would come within the time you mentioned various methods of trying to relieve both the holding company and Merchants Ice & Cold Storage Company of their difficulties, and I made several efforts to get the company financed along various lines, I approached investment houses and also certain parties, too.

Q. Did you approach the firm of Stephenson Leydecker in Oakland? A. Yes, naturally.

Q. Did you speak to R. D. Gross of the R. D. Gross Company here? A. I did.

Q. And your net result of all your attempts was you were unsuccessful in interesting them in the purchase or refinancing of the Merchants Ice & Cold Storage Company? A. That is correct.

Q. You knew that on or about this time Mr. Arnold was also negotiating with Mr. Bercut for the sale or refinancing of this Merchants Ice & Cold Storage Company shares of stock?

A. That is right.

Q. Now, Mr. Richards, can you estimate for us the period of time toward the end of the year 1940 during which you were endeavoring to interest other

(Testimony of Webb Richards.)

persons or firms in this block of Merchants Ice & Cold Storage Company stock?

A. That is right.

A. Let me make my position [391] clear, as far back as the time we were successful in extending these bonds, we were trying to get the company on a financial basis, and the market was so weak that in normal procedure we could see it would be almost impossible, and whenever any of us thought of an idea we would try to work on it; I cannot remember any specific time like say November, 1940. I know that during that period we were attempting to cure their financial trouble.

Q. During the period of negotiations with Mr. Bercut, you, yourself, were endeavoring to interest other persons in the purchase of this stock?

A. That is right.

Mr. Brownstone: That is all.

Cross Examination

Mr. Scampini: Q. Mr. Richards, you were one of the directors who joined in the minutes of August 20, 1940, consenting to the appointment of a receiver—1942, I mean—for the purpose of bringing this proceeding against the Bercuts to set aside this transaction, weren't you?

A. That is right.

Q. And there was a consent to the appointment of a receiver to attack this transaction?

(Testimony of Webb Richards.)

A. Mr. Arnold and I had discussed this matter. I at that time was of the opinion that the prospects of the company would be different from his, but he somehow agreed with me and thought perhaps the receivership would help us out, so I consented to it.

Q. Mr. Richards, Mr. Arnold had asked you to see if you could interest someone in taking over this block of stock owned by the Pacific Empire Holdings in Merchants Ice & Cold Storage Company?

A. To do what?

Q. To take over the block of stock of Merchants Ice & Cold Storage Company owned by Pacific Empire Holdings. Let me see if I [392] make myself clear. I will withdraw the question.

A. If I understand you, no.

Q. What did he say to you on or about October or November of 1940 with respect to your attempting to find someone to buy this block of stock of Merchants Ice & Cold Storage Company owned by Pacific Empire Holdings?

A. Well, the thing that I was working on was not the selling of that block of stock as much as to finance both the Merchants Ice & Cold Storage Company and the holding company, to work out a procedure that would keep them solvent.

Q. Did Mr. Arnold ever ask you to look for someone who would buy the entire block of stock of Merchants Ice & Cold Storage Company owned by Pacific Empire Holdings, Inc.?

(Testimony of Webb Richards.)

A. No, I do not think he did. At least, I never attempted to.

Q. Did you ever try to interest anyone to buy these 75,000 shares of Merchants Ice & Cold Storage Company stock consisting of 65,000 shares of common and over 12,000 shares of preferred owned by Pacific Empire Holdings, Inc.?

A. The exact number of shares I could not say, but the plan I was working on was one of refinancing the company and not to sell it outright.

Q. When did you first find out that Mr. Arnold had sold the entire block of stock for \$35,000 to Peter Bercut?

A. I believe the first time I really knew the complete details of that was at the time you discussed with me the advisability of the receiver at the meeting you spoke of.

Mr. Scampini: No further questions.

Redirect Examination

Mr. Brownstone: Q. Mr. Richards, you knew that Mr. Arnold had consummated some type of deal with Mr. Bercut in February of 1941, didn't you?

A. Whenever that was accomplished I knew it.

[393]

Q. You knew that Mr. Bercut had acquired an interest in Merchants Ice & Cold Storage Company in February of 1941? A. Yes.

Q. As a matter of fact, there were articles in the newspapers about it at that time, weren't there?

(Testimony of Webb Richards.)

A. I don't know about that, but I knew about it.

Q. It was a matter of public and general knowledge, was it not, in San Francisco?

A. I think so. I know Mr. Arnold and Mr. Bercut went down to see me at the time.

Q. So that you knew that the stock had been acquired?

A. I knew that he had acquired it at that time.

Q. Did you know, on or about August 20, 1942, at the time of this meeting at Mr. Scampini's office that prior to the date of that meeting Mr. Scampini had written a letter to Mr. Culbertson, in Delaware, containing the following statement: "The present management is not in a position, practically speaking, to rescind the transaction entered into with Peter Bercut, for the reason that the present management was a party to the transaction. Neither is the corporation in a position to attack the transaction, in a practical sense, for the reason that Merchants Ice & Cold Storage Company claims it has coming approximately \$25,000 from the holding company, and since Peter Bercut now owns the Merchants Ice & Cold Storage Company and runs it, if the corporation were to attempt to rescind the transaction whereby Peter Bercut acquired the said controlling interest, he would, logically enough, direct and see to it that Merchants Ice & Cold Storage Company file an attachment and execution on the claim and thus vitiate the proceeding." And made the further statement: "Any receiver of this

(Testimony of Webb Richards.)

corporation so appointed should be what we lawyers understand as a 'friendly receiver.' I am a creditor of the corporation to the extent of having an [394] unpaid balance due on a note equaling \$500. I also own 3263 shares of the stock of this corporation which years ago cost me considerable money and today is worthless. I suggest the following procedure. I will assign the promissory note to your secretary, Rebecca Tanzer, and transfer the stock to some other person designated by you. Let these two persons, one as a creditor and the other as a stockholder, file a complaint alleging insolvency or imminent threat of insolvency and inability to meet the debts as they mature; alleging further that the corporation can be made solvent by the preservation and conservation of its assets and the prosecution of the claims which it has against persons like Peter Bercut and others." And further stating: "Upon the appointment of such a receiver the first thing to do would be to rescind the transaction whereby Peter Bercut acquired the controlling interest of Merchants Ice & Cold Storage Company. I am sure that this case would be settled very quickly. Any kind of reasonable settlement should enable the corporation to pay off all of its claims, pay a good fee to the receiver and its attorneys, etc., etc., and probably leave something available for the stockholders." Did you know that on or about August 2, 1942, Mr. Scampini had written such a letter to Mr. Culbertson?

A. No.

(Testimony of Webb Richards.)

Q. Did you have any idea that the receivership proceedings had not been initiated in Delaware?

A. No.

Q. Was any such statement made at the meeting of the directors held on August 20, 1942?

A. Not to my knowledge. You understand I was not at that meeting; the minutes were presented to me afterward and I read them and I assented to them.

Q. You did not attend the meeting of the board?

A. I could not, I was out of town. [395]

Q. But you signed the minutes? A. Yes.

Q. Then the minutes of the meeting of August 20, 1942, as contained in Volume V of the minutes of the Pacific Empire Holdings, Inc., Plaintiff's Exhibit No. 6, which states there were present the following members: A. A. Heer, L. R. Arnold, M. T. Ryerson, Webb Richards and M. Maffei, are not correct when they state you were present at the meeting?

A. This is the meeting where the receivership was agreed to. I signed these minutes.

Q. But you were not at the meeting?

A. I could not attend the meeting.

Mr. Brownstone: That is all.

Recross Examination

Mr. Scampini: Q. Mr. Richards, let us take up Mr. Scampini's letter to Mr. Culbertson that was read to you and let us see if any statements are

(Testimony of Webb Richards.)

true or false. Was the Pacific Empire Holdings Company on or about August 20, or August 2, 1942, in your opinion, insolvent? A. Yes. -

Q. Is it not true that Mr. Arnold and Mr. Maffei had told you of a claim being pressed against the company in Wilmington by a group of stockholders?

A. Yes. .

Q. Isn't it true that Mr. Maffei and Mr. Arnold told you that they were consulting with Mr. Scampini to see what could be done about it?

A. I believe they did.

Q. Isn't it true that Mr. Scampini advised you personally in some conversation that in his opinion there was only one thing to do for the preservation of this company, and that was to cause a receiver to be appointed and consent to it?

A. We had a conversation about that very thing.

Q. Isn't it true that Mr. Scampini told you that the transaction [396] between the company and Mr. Peter Bercut was indefensible in law?

A. In your opinion.

Q. Isn't it true that I also told you that a receiver was the only proper person to attack such a transaction before the court?

A. That is correct.

Q. You consented to the appointment of a receiver because in your opinion as a director the company needed one; is that right?

A. That is right.

Q. You also consented to the appointment of a

(Testimony of Webb Richards.)

receiver with the idea in mind that whatever the rights the company had against Peter Bercut and others should be prosecuted; is that right?

A. Yes.

Q. You were trying to do your duty as a director; is that correct? A. Yes.

Mr. Scampini: That is all.

Mr. Brownstone: That is all.

LOUIS T. SAMUELS,

called for defendants; sworn.

Direct Examination

Mr. Naus: Q. You are a real estate broker in San Francisco? A. Yes.

Q. And have been continuously since when?

A. 1916.

Q. Now, in your continuous experience in that business since 1916 have you not dealt in downtown and commercial properties? A. I have.

Q. Would you indicate to his Honor some of the larger deals you have conducted, personally conducted, through those years, the larger ones?

A. You mean individual transactions?

Q. Yes, just a few of them to illustrate the type of activity [397] you have been engaged in.

A. Well, the sale of the City of Paris building, Geary and Stockton, the sale of the City of Paris building at Stockton and O'Farrell—I sold the in-

(Testimony of Louis T. Samuels.)

surance Exchange Building at California and San-some; I sold the property of the Financial Center Building at California and Montgomery; I sold the Bank of America at Powell and Eddy; the Techau Tavern property going over a period of years.

Q. Did you acquire some property for the Emporium?

A. I represented the Emporium in buying the block on Mission between Fourth and Fifth, at the rear of their present property.

Q. Those are simply some of the major items of the many items throughout the years?

A. There are more of them.

Q. I am just trying to give his Honor the picture of it.

The Court: Q. Where is your own building?

A. I still pay rent.

Q. Who owns the Emporium property?

A. The Parrott estate owns the property on Market Street, and then the Emporium bought up the block on Mission Street, and then when they entered into a new lease with the Parrott estate, the Parrott estate bought the property on Mission Street.

Mr. Naus: Q. Now, Mr. Samuels, you have prior to coming to court made a study of the property, lands and buildings of the Merchants Ice & Cold Storage Company, have you?

A. Yes.

(Testimony of Louis T. Samuels.)

Q. And would you indicate or describe to his Honor generally the property itself. I believe you have made a map, haven't you? A. Yes.

Q. Hand it to me and I will ask that it be marked as an exhibit and have it described. It is on three street blocks.

Mr. Pardini: On three blocks, that is correct.

The Court: It may be admitted and marked.

[398]

(The diagram was marked "Defendants' Exhibit L.")

Mr. Naus: Q. This is the diagram that you have prepared?

A. No, I did not prepare that.

Q. It has been prepared?

A. That was given to me as a diagram of the property. I did not prepare that.

Q. Have you or not compared that diagram with the property itself on the ground in your study of it? A. I have.

Q. The property is really an assembly of different units or buildings, isn't it? A. Yes.

Q. To describe the property you have to take up several separate building units; you have to break it up into parcels? A. Yes.

Q. Will you first of all give his Honor a description of the physical properties.

A. There were eight separate buildings, each different in character; so I took each of the units and valued them separately and then totaled them to arrive at a figure.

(Testimony of Louis T. Samuels.)

Q. Take them up one at a time and describe the type of building, its condition, and the like.

A. Well, the first one is a modern building, in good condition.

Q. Would you point it out to his Honor on the diagram, the one you are about to speak of now?

A. It is this building right here; that was constructed in 1924 or approximately that. That one is modern and in good condition, and I put that as the first; I started at that corner.

Q. Finish with your description.

A. It is a six-story building covering the entire lot. I think there is about 18 or 20 feet on what is since called Winthrop Street, which in 1941 was not yet improved. I will put my finger here, if I may. It is a six-story building; it is Class C, that is, wooden floors and wooden steps, but it has light steel frames, it [399] has two elevators, and is in excellent condition.

Q. Now, have you an opinion as to the value of the land and improvements as to that parcel?

A. My valuation of that land is \$19,850. I value the improvements at \$199,184, approximately \$200,000.

Mr. Naus: One moment, if your Honor please. I ask that this paper be marked for identification. It was prepared in typewritten form for convenience to your Honor, if your Honor wishes to follow it as he testifies.

The Court: It may be marked.

(Testimony of Louis T. Samuels.)

(The appraisal was marked "Defendants' Exhibit M for Identification.")

Mr. Naus: Q. What is the size of the lot involved in that parcel?

A. The lot is 183.4 feet on Lombard by 103 feet on Montgomery Street.

Q. Will you turn to the next parcel.

A. The next parcel I have got is southwest Lombard and Sansome Streets. That is this building here. There is one old building here, and this building was acquired since 1941. This is a three-story brick building.

Q. Before proceeding, Mr. Samuels, you were requested to make a study of the property and form an opinion of value as of January 8, 1941?

A. 1941, yes.

Q. So the opinions of value you are expressing are as of that date, is that correct? A. Yes.

Q. By the way, you have also had some photographs of some parts of the property taken, haven't you?

A. I had some photographs taken only of those that are in bad condition and showing what I am stressing. I did not have any photographs taken of this one. [400]

The Court: For the purpose of this case, let the witness go on and give the results of whatever he has done.

Mr. Naus: Q. Will you proceed, then, with parcel 2.

(Testimony of Louis T. Samuels.)

A. Parcel 2, that is the southwest corner of Lombard and Sansome Streets. The size of the lot is 137.6 by 137.6 feet.

Q. What in your opinion was the value of that land and improvements in January, 1941?

A. The value of the land was \$18,900, and the value of the improvements \$40,000, a total of \$58,900.

Q. Would you turn to the next parcel or unit and describe it and point it out to his Honor.

A. This is the corner; this is a six-story building on the south line of Lombard Street 137.6 feet west of Montgomery Street. It runs to a depth of approximately, I think, 150 feet there—127.6 by 150 feet.

Q. What is the type of the improvements?

A. It may be 148 or 147 feet, because another building comes against it.

Q. Describe the improvements on it.

A. The improvements are obsolete. The walls are cracked. This building shows evidence of being at least sixty years old, possibly a little older.

Q. What in your opinion was the value of the lot and improvements as of January 8, 1941?

A. The value of the land was \$18,750, and my conclusion arrived at as to the value of the improvements was \$57,500, a total value of \$76,250.

Q. Turn to the next unit or parcel and describe it and point it out to his Honor.

A. The next one is a one-story building, brick

(Testimony of Louis T. Samuels.)

walls and wood and tar-paper roof. This property is here; the street is not cut through.

Q. Describe the building.

A. This building is in good [401] condition. It was constructed about the same time as the new building, and this is a one-story brick building. Of course, it is the lightest, cheapest construction, such as you would have for a delivery depot, and there are eight small skylights in it. It has a wooden roof with tar-paper, but it is in good condition, and there is nothing that is at all obsolete about it. I understand it was constructed at the same time that the new building was; of this I am not sure.

Q. State your opinion of the value of the land and the improvements as of January 8, 1941.

A. The lot is only about 97 or 100 feet in depth, and I put the value of the lot at \$14,500. It has 145 feet frontage. I valued the improvements at \$25,000, or a total of \$39,500.

Q. Turn to the next parcel or unit and point it out to his Honor and describe the improvements.

A. This is a two-story frame building that was used as a bottling works by the former tenant. In 1941 that was very old, and, as I say, it was just a rough-finished bottling place.

Q. When you say a bottling place, you mean the old Globe Brewery?

A. Yes, the old Globe Brewery. I put the value of the land at \$4,500 and the value of the improvements at \$3,000.

(Testimony of Louis T. Samuels.)

Q. Turn to the next unit or parcel and point it out to his Honor and describe it.

A. There are three or four small sheet iron buildings in the court area inside, that might have been temporary, I don't know, and I put those four buildings on the map here.

The Court: Q. What is the value of that?

A. I put the value of the lot at \$2,000 and the value of the improvements at \$2,500, a total of \$4,500.

Q. What is the next one? [402]

Mr. Naus: Q. I notice the number 6, which is called Engineroom, inside property.

A. That also is inside property.

Q. Describe it.

A. I will have to look in my notes again and get the size. That is a building—that is an engineroom, and I believe that is very old. And then there is part of that that has been constructed at a later date, and it is 40 x 80. In other words, there is an old building to which there has been an addition, and that is used as an engineroom, and I valued the lot at \$4,750 and the improvements at \$12,500, making a total of \$17,250.

Q. I believe the next is parcel 8. Will you point that out to his Honor?

A. This is an entire square block; that is the block bounded by Sansome, Battery, Greenwich and Lombard Streets, that entire block.

Q. Describe that.

(Testimony of Louis T. Samuels.)

A. That block is not the size that the other blocks are. The other blocks are 275 x 400. This block is 275 x 255. I suppose it is cut off because of the Embarcadero.

Q. Describe the improvements.

A. It is the southwest corner of Battery and Lombard; 137.6 x 137.6 is improved with a three-story brick building, a part of which is now occupied by the offices. The building is about sixty years old. And the balance of the block is covered with improvements that are so dilapidated and sunken as to be definitely valueless except for a possible use to the present company. They are one-story and the walls are cracked, the buildings sunken, and it is very hard to put a value on it.

Q. State the value of the lot and the improvements of parcel 8.

A. The value of the lot I put at \$75,625, and the value of the improvements I put at \$50,000. I arrived at these values by putting \$40,000 for the value of this three-story building and [403] cost of the other buildings I put at \$10,000, making a value of \$125,625.

Q. You have brought with you some photographs of the exterior of the buildings? A. Yes.

Mr. Naus: I ask that these be marked as an exhibit.

The Court: They may be admitted.

(The photographs were marked "Defendants' Exhibit N.")

(Testimony of Louis T. Samuels.)

Mr. Naus: Q. Handing you Defendants' Exhibit N, Mr. Samuels, will you display those one at a time to the Judge.

The Court: I think I can look at them all together.

Mr. Naus: All right, hand them to his Honor.

The Witness: This is the one-story building that I am speaking of.

Mr. Naus: Hand them all over to the Judge and if the Judge wishes to know anything further about them he will ask you.

Q. These photographs were taken fairly recently, weren't they? A. Yes.

Q. About when?

A. Within the last three weeks.

The Court: Q. Locate this one for me on the map.

A. Let me get my bearings on this a minute. Here it is.

Q. It is the six-story building? A. Yes.

Mr. Naus: Q. Now, in arriving at your opinion of values there, Mr. Samuels, what did you take into consideration in reaching your opinion?

A. Well, I arrived at the value of the land and the buildings separately.

Q. What is the total value of the land and buildings separately?

A. I took the land and buildings separately.

Mr. Naus: I have taken each parcel and added them, and the land separately is \$158,875, and the

(Testimony of Louis T. Samuels.)

buildings separately is \$389,685, and the addition of the two is what he has, [404] \$548,000.

Q. Did you in arriving at the value of the land, for example, take into consideration other sales of comparable property at or near the time in question? A. I took nine or ten sales.

Q. Just answer Yes or No. A. Yes.

Q. Now, how many sales of comparable property at or near the time in question had you taken into consideration in reaching that value?

A. I took ten sales in comparatively the immediate vicinity.

Q. For convenience, have you got one of these ordinary city plats? A. Yes.

Q. Now, the sales are marked in color on that so that they can be seen quickly? A. Yes.

Q. Will you produce that? A. Yes.

Mr. Naus: I ask that that be marked.

(The map was marked "Defendants' Exhibit O.")

Mr. Naus: Q. Will you point out to his Honor the properties that you have taken into consideration or transactions in other properties. Just give me a description of them generally.

A. These that are marked in red are the properties in question. These are the sales that have been made.

Q. What are these two blocks?

A. I have marked them, 3, 4 and 5. No. 3 is northwest North Point and Stockton Streets. This

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The Court: I think I can look at them all together.

Mr. Naus: All right, hand them to his Honor.

The Witness: This is the one-story building that I am speaking of.

Mr. Naus: Hand them all over to the Judge and if the Judge wishes to know anything further about them he will ask you.

Q. These photographs were taken fairly recently, weren't they? A. Yes.

Q. About when?

A. Within the last three weeks.

The Court: Q. Locate this one for me on the map.

A. Let me get my bearings on this a minute. Here it is.

Q. It is the six-story building? A. Yes.

Mr. Naus: Q. Now, in arriving at your opinion of values there, Mr. Samuels, what did you take into consideration in reaching your opinion?

A. Well, I arrived at the value of the land and the buildings separately.

Q. What is the total value of the land and buildings separately?

A. I took the land and buildings separately.

Mr. Naus: I have taken each parcel and added them, and the land separately is \$158,875, and the

(Testimony of Louis T. Samuels.)

buildings separately is \$389,685, and the addition of the two is what he has, [404] \$548,000.

Q. Did you in arriving at the value of the land, for example, take into consideration other sales of comparable property at or near the time in question? A. I took nine or ten sales.

Q. Just answer Yes or No. A. Yes.

Q. Now, how many sales of comparable property at or near the time in question had you taken into consideration in reaching that value?

A. I took ten sales in comparatively the immediate vicinity.

Q. For convenience, have you got one of these ordinary city plats? A. Yes.

Q. Now, the sales are marked in color on that so that they can be seen quickly? A. Yes.

Q. Will you produce that? A. Yes.

Mr. Naus: I ask that that be marked.

(The map was marked "Defendants' Exhibit O.")

Mr. Naus: Q. Will you point out to his Honor the properties that you have taken into consideration or transactions in other properties. Just give me a description of them generally.

A. These that are marked in red are the properties in question. These are the sales that have been made.

Q. What are these two blocks?

A. I have marked them, 3, 4 and 5. No. 3 is northwest North Point and Stockton Streets. This

(Testimony of Louis T. Samuels.)

land was purchased by the United States Government within the last six months from the Beronio estate. There were 86,281 square feet. That was sold for \$120,000. The improvements were appraised by the Government on the Beronio estate at \$25,000, and the land as \$95,000. I might say this: that the Beronio estate were not satisfied with the Government's figure; there was a contest on this question.

[405]

Q. What was that per square foot?

A. That was \$1.05 a square foot after the contest.

Q. By the way, before going to the other parcels can you tell us approximately what basis per square foot you have used for land here on the Merchants Ice & Cold Storage property?

A. I used approximately \$1 a square foot, by taking into consideration all of the parcels of land that have spur track, corners and inside area.

Q. Take up the other sales. I think you said you had ten. You have described No. 3. Will you point out those to his Honor?

A. Here is one piece, No. 1, a portion of the block adjoining the Merchants Ice & Cold Storage Company. Might I say this so I won't be misunderstood: My brother owned this piece of property, and I have been handling it. My brother acquired it about forty years ago. That is immediately adjoining the building that has been called the Globe Brewery, and I sold that building to Mr. Bercut

(Testimony of Louis T. Samuels.)

about four or five months ago, the building and the improvements, for \$10,000.

Q. You mean to the Merchants Ice & Cold Storage Company?

A. I didn't know to whom I sold it. As a matter of fact, it was an agent that approached me on it. When I sold it, I didn't know to whom I sold it, but that lot was 68.9 by 91 feet. That is the only sale in which I was interested.

No. 2 is a recent sale for the Hastings estate about a year ago, within a few months of this period of time, the block bounded by Embarcadero, Jackson, Oregon and Drumm Streets, approximately 500 feet of street frontage, containing 17,000 square feet, together with a two-story brick improvement, which was very old, and that sold May 1, 1942 for \$14,500. The Hastings estate was the seller and John Rosenfeld Sons [406] the buyer. My office handled it, and that is on the Embarcadero. That was sold for as low as 70 cents per square foot with improvements.

The Court: Q. Go to your next piece.

A. The next one is the Beronio estate, seller, which I have mentioned.

The next one is the block bounded by North Point, Beach, Powell and Mason Streets, 114,000 square feet, sold by the Hibernia Bank to the United States Government for \$120,000. That is a little bit over \$1 per square foot.

Mr. Naus: Q. Where is that located?

A. North Point, Beach, Powell and Mason

(Testimony of Louis T. Samuels.)

Streets. That would be No. 4. Here it is; I have marked it.

Q. Now No. 5.

A. Northwest Mason and North Point. 275 x 255. Frontage 275 feet on North Point, 275 feet on Mason and 275 feet on Beach Street, 75,600 square feet. That sold with some improvements for \$79,500. George Brown was the seller and the United States Government the buyer. That is marked No. 5.

The Court: Q. How much a square foot is that?

A. Well, it is a shade under \$1 a square foot, because there were some improvements, but it was about \$1.03 including the improvements.

The next piece is the southwest corner of Beach and Taylor Streets; Southern Pacific, seller, United States Government, buyer; 128,000 square feet for \$125,000. That is a little over \$1 a square foot; I call it \$1.

Mr. Naus: Q. Where is that?

A. That is the southwest corner of Beach and Taylor Street; that is this one here, No. 6. You know the Government is running the spur track all the way [407] through there.

The Court: Q. Is that all?

A. No, I have some more, if you want them.

The Court: That is sufficient.

Mr. Naus: Q. I would like you, merely in the interest of time, to take a look at Defendants' Exhibit M for identification and state whether you have got the detail as to 7, 8, 9 and 10 on here.

A. Yes.

(Testimony of Louis T. Samuels.)

Q. Your testimony if given would conform to that?
A. Yes.

Mr. Naus: I will offer that in evidence.

(Defendants' Exhibit M for Identification was received in evidence.)

DEFENDANTS' EXHIBIT M

April 16, 1943

Mr. Peter Bercut
743 Market Street
San Francisco, California

Dear Sir:

In the opinion of the undersigned the values of the properties of the Merchants Ice and Cold Storage Co. listed below as of January 8, 1941 were as follows:

1. N.W. corner of Lombard and Montgomery sts., lot having a frontage of 183.4/10 feet on Lombard by 103 feet on Montgomery Street.

Value of lot.....	\$ 19,850.00	
Value of improvements.....	199,184.00	\$219,034.00

2. S.W. Lombard and Sansome sts. Size of lot 137.6 x 137.6 feet.

Value of lot.....	\$ 18,900.00	
Value of improvements.....	40,000.00	58,900.00

3. South of Lombard 137.6 feet West of Montgomery st. 6 story building. Size of lot 137.6 x approximately 150 feet.

Value of lot.....	\$ 18,750.00	
Value of improvements.....	57,500.00	76,250.00

(Testimony of Louis T. Samuels.)

4. S.E. corner Montgomery and Lombard sts. One story brick garage building. Size of lot approximately 145 x 100 feet.

Value of lot.....	\$ 14,500.00	
Value of improvements.....	25,000.00	\$ 39,500.00

5. West line of Sansome st. 68.9 feet North of Greenwich st. Two story frame building. Size of lot 68.9 x 80 feet.

Value of lot.....	\$ 4,500.00	
Value of improvements.....	3,000.00	7,500.00

6. Engine room—inside property.

Value of lot.....	\$ 4,750.00	
Value of improvements.....	12,500.00	17,250.00

7. Four small sheet iron buildings in court area inside.

Value of lot.....	\$ 2,000.00	
Value of improvements.....	2,500.00	4,500.00

Parcels #2 to #7 Are All in Block Bound by Lombard-Greenwich-Sansome and Montgomery Sts.

8. Block bound by Sansome-Battery-Greenwich and Lombard streets. Entire lot 275 x 275 feet—75,625 sq. ft.

Value of lot.....	\$ 75,625.00	
Value of improvements.....	50,000.00	125,625.00

Total Value of All Properties Listed Above.....	\$548,559.00
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(Testimony of Louis T. Samuels.)

Resume:

No. 1.	N.W. Lombard and Montgomery sts.....	\$219,034.00
No. 2.	S.W. Lombard and Sansome sts.....	58,900.00
No. 3.	South Lombard, 137.6 West of Montgomery st.	76,250.00
No. 4.	S.E. Montgomery and Lombard sts.....	39,500.00
No. 5.	West Sansome 68.9 North of Greenwich st.	7,500.00
No. 6.	Engine room—inside property.....	17,250.00
No. 7.	4 small sheet iron buildings.....	4,500.00
No. 8.	Block bound by Sansome-Battery Green- wich and Lombard Streets.....	125,625.00
Total Value		<u><u>\$548,559.00</u></u>

Very truly yours,

LOUIS T. SAMUELS

Memorandum attached hereto explains in detail above valuation.

Parcel No. 1. Northwest Lombard and Montgomery streets. Winthrop Street was not open in March 1941. Improvements were erected in 1924. Have therefore deducted 34% for depreciation. Building is 6 story Class "C"—light steel frame—wooden floors.

Parcel No. 2. S. W. Lombard and Sansome Sts. 3 story brick—between 55-60 years in age—obsolete.

Parcel No. 3. South line of Lombard st. 137.6 feet West of Montgomery st. Also close to 60 years in age. Brick walls badly cracked throughout—roof in bad condition—obsolete.

Parcel No. 4. S. E. Lombard and Montgomery sts. Good condition—trussed roof—constructed in 1924.

(Testimony of Louis T. Samuels.)

Parcel No. 5. West line of Sansome st. 68.9 feet North of Greenwich st. Very old—improvements almost valueless.

Parcel No. 6. Northerly portion old—Southerly addition 40 x 80 feet—constructed around 1924.

Parcel No. 7. Four small sheet iron buildings very little value.

Parcel No. 8. Square block bound by Battery-Sansome-Lombard and Greenwich sts. Of this block S. W. Battery and Lombard is improved with a 3 story brick building—office on portion of ground floor. Balance storage and refrigeration. This building was also constructed about 60 years ago. Old and obsolete. Entire balance of square block with frontage of 275 feet on Sansome Street, 275 feet on Greenwich Street and 137.6 feet on Lombard Street is covered by a sunken, dilapidated one story building—outer walls cracked throughout—practically valueless. Figuring depreciation at 2% per annum (50 year life) the value of major portion of improvements might be deemed as wiped out. They still, however, retain some usefulness to present tenants.

As to land values: Have given consideration to those portions of land that have spur track—also corners and inside area—appraising land valuations. Quote the following sales to substantiate my land valuations.

1. N. W. corner of Sansome and Greenwich sts. portion of block—balance of which is owned by

(Testimony of Louis T. Samuels.)

Merchants Ice and Cold Storage Co.—size 68.9 x 91 feet with 2 story improvements—60 years old—sold August 4, 1942 to Merchants Ice and Cold Storage Co. for \$10,000.00.

2. Block bound by Embarcadero-Jackson-Oregon and Drumm sts. ~~having~~ approximately 500 feet of street frontage—containing 17,000 sq. ft.—together with 2 story brick improvements—sold May 1, 1942, for \$14,500.00. Hastings Estate, Seller. John Rosenfeld's Sons, Buyer.

3. N. W. North Point and Stockton Sts. . . . 3 frontages. 275 ft. on North Point—275 ft. on Stockton st.—and 275 ft. on Beach st. 86,281 sq. ft.—
land sold for.....\$ 95,000.00
improvements sold for..... 25,000.00

about \$1.05 per sq. ft. after contest.....\$120,000.00

Beronio Estate, Seller—U. S. Government, Buyer.

4. Block bound by North Point-Beach-Powell and Mason sts. 114,000 sq. ft. sold for \$120,000.00. Hibernia Bank, Seller—U. S. Government, Buyer.

5. N. W. Mason and North Point sts 275 x 275 ft. Frontage 275 ft. on North Point—275 ft. on Mason—and 275 ft. on Beach st. 75,600 sq. ft. Sold for \$79,500.00 including some improvements. George Brown, Seller—U. S. Government, Buyer.

6. S. P. to U. S. Government—128,000 square feet for \$125,000.00.

7. N. E. Union and Battery Sts. size: 155 x 150

(Testimony of Louis T. Samuels.)

feet—sold for 75¢ per square foot—July 25, 1942/ to Gus Lachman, Seller—U. S. Navy, Buyer.

8. S. W. Union and Front sts. 3 story concrete building—size: 70 x 125 ft, sold by McCreery Estate for \$25,000.00.

9. Two blocks facing Columbus Ave—bound by Bay-Francisco-Taylor and Mason sts. Sold to the Housing Board at \$1.00 per square foot—June 3, 1941.

10. Stockton and North Point. 27,000 sq. ft. sold for \$27,000.00. Bank of America, Seller—U. S. Government, Buyer.

None of the above properties were under financial pressure—each and every one was unencumbered. All of the properties excepting those sold to the government had been offered by willing sellers and sales were best prices obtainable. Sales to government were the result of appraisals by real estate experts.

In conclusion am familiar with every detail of the condition of this property as of January 8, 1941—as I personally handled the corner of Sansome and Greenwich sts. immediately adjoining these properties for an absent brother. Was repeatedly on the premises ~~in~~ during 1941 in an endeavor to lease or sell. Know the condition at that time and the improvements since made.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 22339R. Defts. Ex. No. M. Filed 5-7-43. Walter B. Maling, Clerk. By J. P. Welsh, Deputy Clerk.

(Testimony of Louis T. Samuels.)

Cross Examination

Mr. Scampini: Q. Mr. Samuels, how long have you been in the real estate business?

A. Since 1916.

Q. Have you handled many industrial properties in your experience? A. Many.

Q. Have you had numerous transactions involving the sale of industrial properties?

A. I suppose I have had from sixty to eighty.

Q. Now, you are acquainted, of course, with the American Appraisal Company, aren't you? You know what that concern does, don't you?

A. No. I have heard the name, but I personally cannot say that I am acquainted with them. I know that there is a firm that makes appraisals.

Q. Is it a reputable concern, in your opinion?

A. I am not qualified to answer that.

Q. This six-story building, do you know when that was constructed?

A. You mean the new building—1924.

Q. Do you know at what cost it was constructed?

A. No. [408]

Q. Is it a good building?

A. It is in excellent condition.

Q. Now, if I were to tell you, Mr. Samuels, that in the year 1927 the improvements, not the land but the improvements with respect to which you have testified, with the exception of some minor items were appraised by the American Appraisal Com-

(Testimony of Louis T. Samuels.)

pany on two bases, cost of reproduction new—strike out that question.

Did you make any effort to appraise the machinery and equipment in these buildings?

A. . Not at all.

Q. You don't know anything about that?

A. I am not qualified.

Q. Well, now, if I were to tell you that the six-story building—will you assist me in finding the appraisal of this six-story building in this volume?

Mr. Naus: As I remember it, Mr. Scampini, there is a diagram in there showing it.

The Court: We will take a short recess.

(After recess:)

Mr. Scampini: Q. Mr. Samuels, you brought some photographs here into the court. Who took those photographs?

A. Moulin is the name—Gabriel Moulin.

Q. Did you take any of the pictures yourself?

A. No.

Q. Were you there when they were taken?

A. Yes, I went with the photographer.

Q. Did you go around looking for cracks to photograph? A. Definitely, yes.

Q. Did you go around looking at all of the buildings? A. We went over all the buildings.

Q. Now, there are two six-story buildings on this property, aren't there? A. Surely. [409]

Q. You only brought pictures of one. Where is the other?

(Testimony of Louis T. Samuels.)

A. The other is in excellent condition.

Q. You just took a picture of the building that looked dilapidated; is that right? A. Yes.

Q. Now, the one that is in excellent condition is located on this piece of land designated as lots 11, 12 and 14 of the American Appraisal Company; is that correct? A. I don't know the numbers.

Q. The particular photograph of that building you did not take? A. No.

Q. This is the one that was built with the bond issue? A. I don't know anything about it.

Q. This is the building that is the most modern building of the lot?

A. This is the building I said was in excellent condition.

Q. If I were to tell you, Mr. Samuels, that the American Appraisal Company gave an aggregate sound value not of the land but just of the improvements and machinery in 1927 to all of these buildings, including the one which is in good condition, a photograph of which you did not take, of \$1,030,402.68 in 1927, would you think that was a reasonable appraisal?

A. I would still take these valuations.

Q. As of 1927? A. As of 1941.

Q. But would you say that in 1927 the reasonable value of these buildings and improvements of the land that you saw, with the exception of a few minor additions, would you say the reasonable value, reasonable sound value of \$1,030,000 was excessive in 1927?

(Testimony of Louis T. Samuels.)

A. Those figures would make no impression on me at all, those figures you have just given.

Q. Projecting yourself back to 1927, you were in business at [410] that time, weren't you?

A. I knew all of these properties as of 1927 as well as I do today.

Q. And would you say that a value of \$1,000,000 for all of the buildings in 1927 was excessive?

A. Is it necessary for me to pass judgment on somebody else's appraisal?

The Court: He is asking for your opinion.

Mr. Scampini: Q. I am asking your opinion.

A. I think they were ridiculous.

Q. In 1927?

A. Yes, ridiculously excessive.

Q. Are you generally familiar with construction engineering? A. Not engineering.

Q. Are you familiar with the cost of reproduction new of these buildings? A. Yes.

Q. If I were to tell you that the American Appraisal Company gave reproduction cost in 1927 of these buildings as \$1,200,000 and itemized it, would you say that was an excessive reproduction cost?

A. That would not change my conclusion at all.

Q. You say you are familiar with industrial property generally. Are you familiar with a piece of property on Bryant Street near Fourth, a copper and brass works, 200 feet by 150 feet, which is 30,000 square feet?

A. That is the northwest corner?

(Testimony of Louis T. Samuels.)

Q. That is 100 feet from the corner, 200 feet on Bryant. There are no spur tracks on Bryant Street, are there? A. No.

Q. As industrial property, would you say that that piece of property on Bryant 200 by 150 compares to Embarcadero property?

A. You are speaking of the market value, aren't you?

Q. I am.

A. You mean ground or improvements?

Q. Ground value.

A. As of last year or the present time?

Q. As of the present time or last year, would you say that [411] the Embarcadero industrial property was worth as much as the industrial property on Bryant Street without spur tracks?

A. No, Bryant Street is more salable.

Q. More salable? A. More demand for it.

Q. More demand for industrial purposes or for other purposes?

A. More buyers interested, more demand.

Q. Now, a cold storage plant on Bryant Street, from the point of view of cold storage, property on the Embarcadero would be worth more than Bryant Street, would it not?

A. No, Bryant has a greater selling price—not considerable, but I should say that Bryant Street would be worth maybe twenty-five or thirty per cent more than Sansome and Greenwich.

Q. How much more do you think it would be

(Testimony of Louis T. Samuels.)

worth than Embarcadero and Lombard, where the main building of this company is?

A. I just said there was a market of 70 cents a square foot at a place better than this because it approaches the Mission district, 17,000 square feet with twelve fronts that sold for \$14,500. It has been offered to the general market for three weeks for \$17,500, no buyers, then at \$16,500, and then we *made of* \$14,500 that was accepted by the Hastings estate in the last six months.

Q. Was this an empty building?

A. No, the building was dilapidated, but——

Q. Was there any revenue?

A. It has a two-story building, which is not in good condition—cracked walls—but there are 105 rooms which are bringing 125 a month, and there are eight stores, one on Drumm Street, bringing \$85—I know this, because I am collecting all the rents. There were three saloons on the Embarcadero. The eight stores are now vacant because the Government has stopped passage on the Embarcadero beyond [412] Jackson Street, but the rental would be \$350 a month.

Q. You sold it for how much? A. \$14,500.

Q. These buildings of the Merchants Ice & Cold Storage Company which you value roughly at about \$300,000, and the land at about \$200,000——

Mr. Naus: The buildings he has valued at \$389,000 and the land at \$158,000.

Mr. Scampini: Q. You know they are adequate

(Testimony of Louis T. Samuels.)

to accommodate the business of a company doing a gross revenue of \$800,000 a year, don't you?

A. I know nothing about the business at all.

Q. You are just valuing these buildings as if they were in a state of abandonment and you offer them for sale?

A. Not abandonment. We have a regular system by which we work and I would be glad to give it to you.

Q. Did you give much time to investigating this property?

A. I went over it very carefully, because I realized that I had to testify each conclusion that I arrived at.

Q. You are being paid for your services, aren't you?

A. I probably will be.

Q. The revenue on this piece of property which you sold for Hastings, you said, was approximately \$350 a month, you say?

A. I said the gross revenue was \$350.

Q. How much were the taxes on the property?

A. The taxes were approximately \$2,800—I will give it to you exactly—slightly under \$2,700 a year.

Q. That is a little over \$200 a month?

A. Almost \$225 a month.

Q. That has to be deducted, of course, plus insurance, from the revenue before you reach net revenue; is that right? [413]

A. Yes.

Q. You sold it to whom, a speculator?

A. I sold it to John Rosenfeld Sons.

Mr. Scampini: That is all.

PETER BERECUT,

recalled for defendants; previously sworn.

Direct Examination

Mr. Naus: Q. Mr. Bercut has already been called by the other side, so I do not propose to go over the ground already covered. Mr. Bercut, would you tell me, please, whether you attended as a director any actual meetings of the directors of Pacific Empire Holdings, Inc., actually held?

A. I do not think I attended any meeting since 1936 or somewhere around that time.

Q. So far as your memory or knowledge goes, you know of no meeting of the directors of the Pacific Empire Holdings, Inc. since 1936?

A. Not to my knowledge.

Q. Have you any memory or knowledge with respect to whether any meetings of the so-called executive committee of the Pacific Empire Holdings Company, Inc. were held? A. No.

Q. Have you any recollection of ever attending a single one? A. No.

Q. Now, with respect to the Merchants Ice & Cold Storage Company, the directors of that company did meet, didn't they? A. Yes.

Q. Now, turning to the time of the negotiations for the acquisition of this Merchants Ice & Cold Storage Company stock, did you personally study the balance sheets or did you have Mr. Evans make that study for you?

A. I had Mr. Evans do it. [414]

(Testimony of Peter Bercut.)

Q. Have you ever personally studied the balance sheets at any time? A. No.

Q. On this or any other matter? A. No.

Q. Now, there was a suggestion by Mr. Morrish about Mr. Arnold having said he did some special work for you. Did Mr. Arnold ever do any work for you, special or otherwise, at any time?

A. No.

Q. Were you and Mr. Arnold at any time ever close or very close friends, socially, in a business way or otherwise? A. No.

Q. Now, Mr. Bercut, after taking over the management of the Merchants Ice & Cold Storage Company did you personally do anything about this matter of going out into the business world and getting new business from merchants?

A. Yes.

Q. By the way, whether you had ever run a cold storage business before or not, had you been a user of cold storage for many years? A. Yes.

Q. For how many years?

A. Well, in our business, the meat business, you can't be in the meat business without having cold storage.

Q. You mean down at the Grant Market?

A. Yes.

Q. You handle an enormous tonnage of meat down there, don't you, and a large amount of cold storage? A. Yes.

Q. Now, during the years you have been in

(Testimony of Peter Bercut.)

business that way, had you for many years before the Merchants Ice & Cold Storage Company deal had personal and business contacts with the meat industry and packing industry? A. Yes.

Q. When you took over the management of the Merchants Ice & Cold Storage Company, just tell the Judge briefly what you personally did about bringing in new business for that company. [415]

A. Well, I went to the wholesale meat people that I was doing business with in my meat business and asked them to patronize me in the cold storage business, I was in that business, and assured them that I knew how to handle meat, keep it in a way like butchers handle it, see that it was in first class shape, that I had been in that business for the last fifteen or twenty years, and asked them to patronize the Merchants Ice, and I was very well respected. I met Mr. Swanson from Sacramento, who did a very large business with us, and before that he had done business for twenty years with the National Ice Company, and they said they would give all their business to Bercut, and it has been there ever since. And I had to go and see Swift & Company; Mr. White was the manager, and they were not putting any merchandise in with us for a time on account of the trouble that we had with the bank. And Mr. White told me he received orders from the main office in Chicago that they were to withdraw everything.

Q. You mean from the butter warehouse re-

(Testimony of Peter Bercut.)

ceipts, that the bank started to refuse to take the Merchants Ice & Cold Storage receipts as collateral?

A. Yes, they stopped putting meat in Merchants Ice & Cold Storage Company and continued withdrawal, so I gave him my personal guarantee that that would never occur with the Merchants Ice, and I succeeded in getting them back to the plant, and we did a large business with them. Then I got business with the Cudahy Meat Company over in Oakland; I succeeded in moving them over to the Merchants. Then I went to Washington and went to the Surplus Commodity Meat Commissioner and I assured him that the company would take care of merchandise and other business coming to the Coast, and when I got back there a car coming into the Merchants, and ever since [416] we have done a nice business, about fifty cars a month.

Q. As you went around to bring in this business, did you or not as you went around give personal promises that you would stand behind that business?

A. Yes, I gave my personal promise, but people knowing me usually trust me.

Q. Now, at or about the time that you took over the management, you remember the Bank of America brought suit on that butter deal for about \$40,000 against the Merchants Ice & Cold Storage Company, don't you?

A. Yes.

Q. And they levied an attachment. You recall that circumstance, don't you?

A. Yes.

Q. Isn't it a fact that the Bercut family person-

(Testimony of Peter Bercut.)

ally put up the attachment bond to release that attachment? A. Yes.

Mr. Naus: You may cross examine.

Mr. Scampini: No questions.

Mr. Naus: Defendants rest.

Mr. Scampini: We rest.

(Thereupon the case was submitted on briefs to be filed 10, 10 and 10, and placed on the calendar for June 23.) [417]

In the Superior Court of the State of California,
in and for the City and County of San Francisco.

No. 312,800

THOMAS H. WINGATE, as Receiver in Equity
for PACIFIC EMPIRE HOLDINGS, INCORPORATED, a corporation of the State of Delaware; and PACIFIC EMPIRE HOLDINGS, INCORPORATED, a corporation of the State of Delaware,

Plaintiffs,

vs.

PETER BER CUT, ERNEST E. BER CUT,
HENRY BER CUT, JEAN BER CUT, MARY
DOE BER CUT, MARY JANE BER CUT,
FIRST DOE, SECOND DOE, THIRD DOE,
BLUE AND WHITE, a corporation, XYZ, a
copartnership,

Defendants.

DEPOSITION OF LEONA KEENER

Be It Remembered, that pursuant to stipulation between counsel for the respective parties, and on Saturday, the 3rd day of October, 1942, commencing at the hour of 11:00 o'clock A. M. thereof, at Room 816, No. 300 Montgomery Street, San Francisco, California, before me, Mary T. Collins, a Notary Public in and for the City and County of

(Deposition of Leona Keener.)

San Francisco, State of California, personally appeared

LEONA KEENER,

who, being by me first duly sworn, was thereupon examined and interrogated as a witness in said cause.

A. J. Scampini, Esquire, appeared as attorney for the plaintiffs; and Louis E. Goodman, Esquire, and Louis H. Brownstone, Esquire, appeared as attorneys for the defendants Peter Bercut, Ernest E. Bercut, Henry Bercut and Jean Bercut.

It was stipulated between counsel for the respective parties that the Notary Public, after administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that the said deposition should be reported in shorthand by R. R. Roberson, a competent official shorthand reporter and a disinterested person, and thereafter transcribed by him into longhand typewriting, to be read to, or by, the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

It was further stipulated that if the witness should be instructed not to answer questions propounded by counsel, in the absence of the Notary

(Deposition of Leona Keener.)

Public, it shall be deemed that the Notary Public has so instructed the witness to answer, but that she still refuses to answer.

Mr. Goodman: I want to reserve the same objection that I made on the depositions of Mr. Arnold and Mr. Heer as to the legal capacity and right of the plaintiffs to maintain this action.

Mr. Scampini: Yes.

LEONA KEENER,

being duly sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Mr. Scampini: Miss Keener, your full name is what? A. Leona Keener.

Q. And where do you work now, Miss Keener?

A. At the Federal Outfitting Company.

Q. And what is your position?

A. I am the secretary for Mr. Shragge, the president.

Q. Do you expect to leave this city and county soon?

A. I am not sure—outside the city and county.

Q. You are not certain about it? A. No.

Q. In the event, of course, that you are residing

(Deposition of Leona Keener.)

here at the time of trial of this case, then of course we may subpoena you, but we are taking your deposition now in behalf of the plaintiffs, on the assumption that you may not be available as a witness.

A. Yes.

Q. And we are taking your deposition now in the case of Pacific Empire Holdings, Inc. vs. Peter Bercut and other defendants.

Now, were you employed at any time by Pacific Empire Holdings, Inc.?

A. Yes.

Q. In what capacity?

A. As secretary.

Q. By "secretary" you mean not the officially designated secretary—

A. No.

Q. But stenographer-secretary?

A. Stenographer-secretary, yes.

Q. And when did you cease your connection with the company?

A. On June 16th of this year.

Q. And how long were you with the company in that capacity?

A. Four years approximately.

Q. Do you know M. Maffei?

A. Yes, I do.

Q. Mr. Arnold?

A. Yes.

Q. Mr. Richards?

A. Yes.

Q. Mr. Ryerson?

A. Yes.

Q. Mr. Peter Bercut?

A. Yes.

Q. Were you acting as such stenographer-secretary on or about January 8th, 1941?

A. Yes.

Q. And as such do you recall anything unusual happening, or any dictation which took place at or about that time, or immediately prior or immedi-

(Deposition of Leona Keener.)

ately thereafter, concerning the resignation of Mr. Peter Bercut? A. Yes.

Q. And do you recall that incident?

A. I do recall it.

Q. Approximately when did it take place?

A. It was approximately in January—the latter part of January.

Q. Of what year? A. Of 1941.

Q. And what did take place? Tell us to the best of your recollection exactly what happened.

A. Mr. Bercut was in the office and asked me to dictate—or to dictate to me a resignation to the holding company as officer and director of that company.

Q. And did you take it in your notebook then at that time? A. Yes.

Q. And have you got that notebook with you?

A. Yes, I have. (Producing notebook.)

Q. Will you please find it—look at your notebook and see if you have any record of the dictation of Mr. Peter Bercut? A. I have it.

Q. And what is that notebook which you have in your hand now?

A. This is the notebook that I used for the holding company. This is from the year '41 I'm looking at right now.

Q. And what page are you looking at?

A. I don't quite understand you.

Q. I say what page of the notebook? Have you got the pages numbered? A. No, I haven't.

(Deposition of Leona Keener.)

Q. Well, do you find any record in that notebook which you have of the dictation of Mr. Peter Bercut to you concerning his resignation? A. Yes.

Q. And is it written in shorthand?

A. Yes, it is.

Q. And will you read it into the record, please?

A. Yes. (Reading from notebook.) By Peter Bercut to Pacific Empire Holdings.

"Because of the pressure of this business I will be unable to devote sufficient time to the company to be of real value. Consequently please consider this letter as my resignation as an officer and director of Pacific Empire Holdings, Incorporated."

Q. Have you got any notation on that page of the date on which the dictation was given to you?

A. The date was January 29th, '41.

Q. And who were present, so far as you recall, at the time the dictation took place?

A. Mr. Bercut and Mr. Arnold and myself.

Q. Was there any discussion between these parties in your presence, that you recollect?

A. Yes, there was. The resignation was dated back to, as my records show, March 3rd, 1940.

Q. And was anything said concerning that phase of the transaction or dictation, by any of the persons present?

A. Nothing, except to date it back.

Q. And who said to date it back, if you recall.

A. I couldn't say who said it.

Q. Did you date it back pursuant to instructions? A. Yes, I did.

(Deposition of Leona Keener.)

Q. And you afterwards transcribed the notes which you have just read into letter form, did you?

A. Yes.

Q. And what did you do with that letter?

A. Mr. Bercut signed it. I gave it to Mr. Bercut, and he signed it.

Q. And then what happened to the letter?

A. And then, as I recall, he turned it over to Mr. Arnold. I couldn't be definite on that.

Q. I see. Was any dictation given to you by Mr. Peter Bercut at that time or at any other time to your knowledge concerning resignation in the Pacific Empire Corporation?

A. Nothing at all; that is the only one I have.

Q. I see. That is all I want of you, except to identify the letter when I find it.

Cross Examination

Mr. Goodman: Q. Miss Keener, is that the only time that you ever took any dictation from Mr. Bercut?

A. Yes, to the best of my knowledge.

Q. That is, that one occasion?

A. Yes.

Q. And have you looked through your book to see whether or not you have any other letters or documents of any kind that were ever dictated to you by Mr. Bercut?

A. No, I didn't, because I am pretty sure—I am rather sure I haven't any.

Q. Your recollection is quite clear that this was the only occasion that any document was ever dictated to you by Mr. Bercut?

A. Yes, sir.

(Deposition of Leona Keener.)

Q. And have you any dictation in the book which you have with you, on January 29th, 1941, except this letter—except or besides this letter of Mr. Bercut's?

A. I have one here for the 28th, and the next is the 29th.

Q. Well, what I am trying to find out is, have you any other dictation in your book as of January 29th?

A. Yes, I have.

Q. On other subjects?

A. On other subjects.

Q. And who did that dictating?

A. Mr. Arnold.

Q. Is there anything—have you the date that you put on this letter in your notebook? Does the date appear there?

A. Yes, it does.

Q. May I see it, please?

A. Yes. That is March (indicating).

Q. Now, where does the writing continue from the column—I wonder whether we can have this marked?

Mr. Scampini: We will offer that into evidence—the book.

Mr. Goodman: Yes, and we will subsequently identify it; we will put a sticker on this page of some kind to identify it, so when I refer to it now we will know that that is the page that I am referring to.

Q. On the page of the notebook that is to be identified by the reporter, so we will know what

(Deposition of Leona Keener.)

page we are referring to, are two columns of shorthand work? A. Yes.

Q. Now, at the bottom of the right-hand column where do you continue your writing to?

A. To here (indicating).

Q. Now, at the bottom of the right-hand column of your notebook, this page, appears the word "Frostrcraft". A. Yes.

Q. With the date? A. Yes.

Q. And is that continued, then, on over onto the next page?

A. No, you see when the date is like this—it was probably something that was written back—the date of my notes appears like that (indicating).

Q. No, I think you don't understand what I am driving at. Is this the start of a letter down at the bottom?

A. No, that is merely a notation of my own.

Q. And what does that notation refer to? It says, "Frostrcraft June 1 '40."

A. Probably somebody asked me to look something up concerning Frostrcraft as of that date.

Q. Well, is there any connection between this notation "Frostrcraft June 1 '40" at the bottom of the second column of your notes on that page and the letter with reference to Peter Bercut?

A. None whatsoever.

Q. None whatsoever. And following after that notation "Frostrcraft June 1 '40", is there anything in your notes that has to do with the Frostrcraft? A. Nothing at all.

(Deposition of Leona Keener.)

Q. Now, after you finished this page where did you go? A. To here (indicating).

Q. Now, I notice that at the top of the next page of your notes, after the words—on the next page—that is, the page following the page that we have been referring to—appears “T. M. Ryerson”.

A. Yes.

Q. Now, what does that refer to?

A. That is a letter to Mr. T. M. Ryerson.

Q. That Mr. Arnold dictated? A. Yes.

Q. Now, is there anything that you can refer to in your notes which would recall to you what the notation “Frostcraft June 1 '40” refers to?

A. Nothing at all. That was just one of my ways—a reminder, to put something in my notes; something was probably asked for, and I just put it down so that I wouldn't forget it. You see, there is no shorthand after that. Next starts a letter.

Q. Now, just let me look at it, please. (Examining notebook.)

Now, you say that the date that you have read with respect to this letter which you took from Mr. Bercut refers to——

A. That is March—March 3rd, '40.

Q. Where does the “March” appear?

A. That is shorthand for “March.”

Q. Oh, you are referring to where the shorthand symbol for “March” appears? A. Yes.

Q. Now, what is this little mark after the words “Peter Bercut” in your notes?

(Deposition of Leona Keener.)

A. That is the way I end a letter and start another one. That is the end of this (indicating).

Q. Oh, I see. Now, up at the top it says "Peter Bercut." Now, what is the next shorthand notation after that?

A. That is dictated by Peter Bercut to the holding company.

Q. Who was present when Mr. Peter Bercut dictated that, as you say?

A. Mr. Bercut, Mr. Arnold and myself.

Q. And did Mr.—you said that Mr. Peter Bercut never dictated anything else at all at any time?

A. No, he never has.

Q. That is the only document or letter of any kind that he has ever dictated to you?

A. Yes.

Q. You are quite sure about that?

A. I certainly don't recall any other occasion that he ever dictated anything to me.

Q. And are you quite sure that you only did one letter that day which Mr. Bercut signed?

A. I really don't know. If there were any other resignations that day, it may have been that they just sent the same letter to the different companies.

Q. Have you any recollection of doing that?

A. I couldn't say definitely now. If I could look at the copies of the letters, I would know.

Q. On the next page, I have asked you about this letter to Mr. Ryerson. A. Yes.

Q. Does that letter to Mr. Ryerson have any-

(Deposition of Leona Keener.)

thing to do with the transaction with Mr. Bercut—
if you can still read your notes as to that?

A. I can read my notes. Nothing whatever.

Q. It has nothing to do with the Bercut transaction?

A. Nothing at all.

Mr. Scampini: What date does that letter bear?

A. This is the same date.

Mr. Goodman: The same date. I have already gone into that.

Q. Was it a personal matter or a business matter? I am not asking to be inquisitive. I just want to find out.

A. Yes. I am reading it over.

Q. I see.

A. It was another business matter. It had nothing to do with Mr. Bercut.

Mr. Goodman: I think that is all. I think you will have to mark that some way or other.

Mr. Scampini: Yes. I think we will have to adjourn this deposition to a convenient time so as to identify that letter, the original. I will ask that the notebook of Miss Keener be admitted in evidence as plaintiffs' exhibit next in order, and that the page from which Miss Keener read concerning the resignation of Mr. Bercut be marked for identification by the reporter.

Mr. Goodman: You had better put something on this to locate the place.

(Deposition of Leona Keener.)

Mr. Scampini: Yes, I will ask her to point it out to him so he can mark it.

Mr. Goodman: Where is it, now?

A. I will find it.

Mr. Scampini: Will you just point out to the reporter exactly where that letter starts, and we will get photostatic copies.

A. Yes. (Putting rubber band on notebook.)

(Notebook marked "Plaintiffs' Exhibit No. 1.")

Mr. Scampini: Now, we will have to find that original letter, and I will call you and let you know; it will take very little time—just to identify it, if you can.

A. Yes. And let me know two or three days in advance.

Mr. Scampini: Yes. And you let me know in case you can't arrange it, so we can work it out some way.

A. Yes.

Mr. Scampini: That is all.

Mr. Goodman: That is all.

Mr. Scampini: Thank you very much for your courtesy.

(Thereupon an adjournment was taken to a time to be mutually agreed upon between counsel.)

(Deposition of Leona Keener.)

Room 816, No. 300 Montgomery Street,
San Francisco, California,

Monday, October 12th, 1942, 10:00 A. M.

(Pursuant to adjournment, at the above time and place, the following proceedings were had, there being the same appearances as hereinbefore noted.)

Mr. Scampini: Now, Mr. Goodman, this is in the Pacific Empire Holdings Company deposition of Miss Keener. We never did close that deposition, due to the fact that we could not find the original letter of resignation of Mr. Bercut, which is "Plaintiffs' Exhibit No. 4" on the deposition of Mr. Arnold. Will it be stipulated, Mr. Goodman, that this copy of the exhibit which is in Mr. Arnold's deposition, and which is the one that has been lost, if exhibited to Miss Keener, would be identified by her, other than the signature, as being the letter of resignation which she testified was typed out by her on or about January 28th, 1941, and delivered by her to Mr. Bercut, who thereupon signed it and delivered it to Mr. Arnold? (Showing paper to Mr. Goodman.)

Mr. Goodman: I will stipulate this is a copy of the original document.

Mr. Scampini: Yes.

Mr. Goodman: And that it may be deemed admitted as if it were the original.

(Deposition of Leona Keener.)

Mr. Scampini: All right.

Mr. Goodman: With the same force and effect, but I don't want to stipulate the other things that you say, because I don't know whether or not—

Mr. Scampini: Well, she testified in her deposition that she typed out the letter, and she read it from her notes, and it is exactly in haec verba the letter which she read. So in lieu of the original, I will offer this into evidence.

Mr. Goodman: There will be no objection.

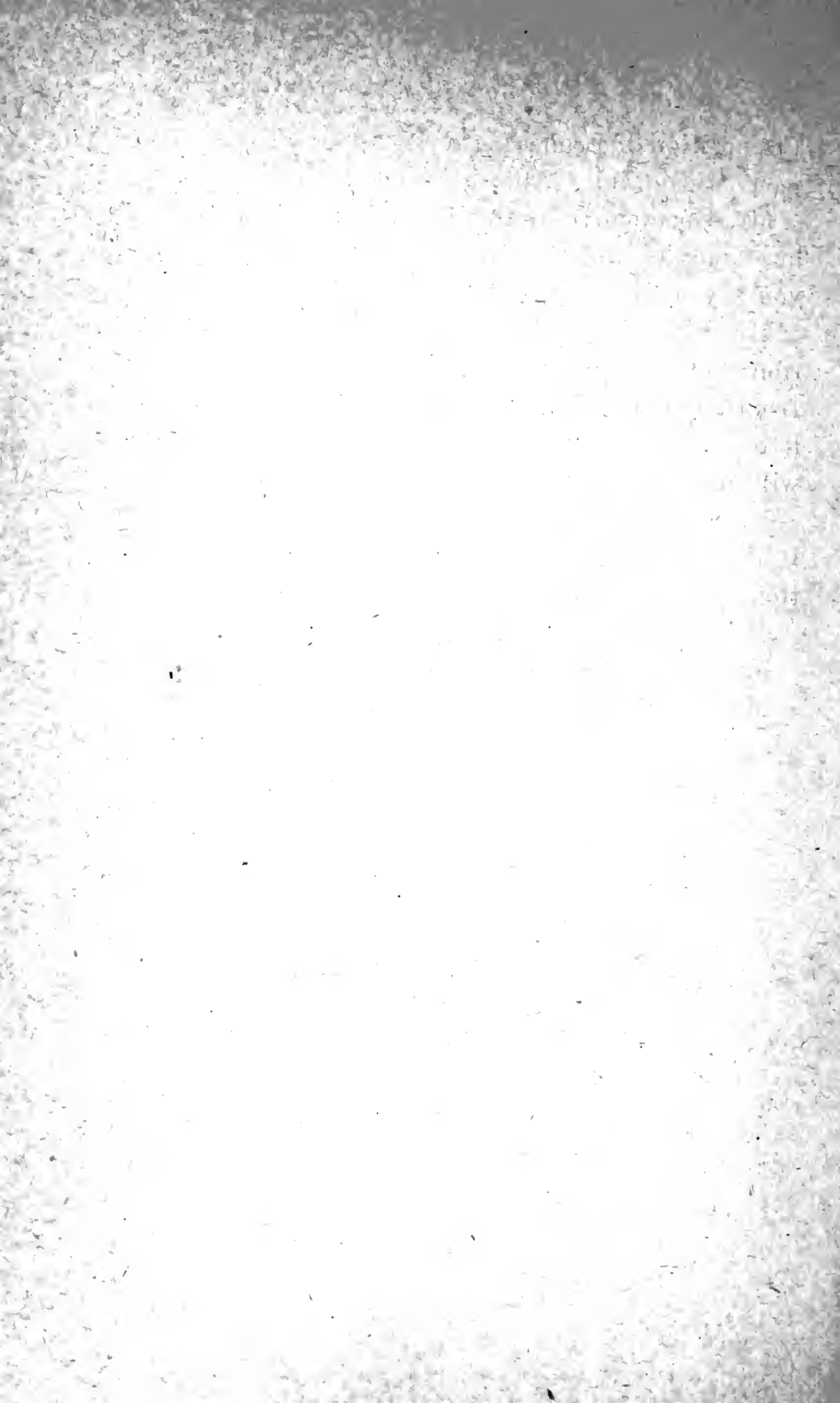
Mr. Scampini: And shall we deem the deposition of Miss Keener, then, to be closed?

Mr. Goodman: Yes.

Mr. Scampini: Very well.

Mr. Goodman: I have no further questions.

LEONA KEENER



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(Deposition of Leona Keener.)

PLAINTIFFS' EXHIBIT 2

(Copy)

March 31, 1940

Pacific Empire Holdings, Inc.,
26 O'Farrell Street,
San Francisco, California.

Gentlemen:

Because of the pressure of other business, I will be unable to devote sufficient time to the company to be of real value.

Consequently, please consider this letter my resignation as an Officer and Director of Pacific Empire Holdings, Inc.

Yours very truly,

PETER BER CUT

PB/lk

[Endorsed]: Plff's Ex. No. 2. R. R. Roberson,
Reporter.

State of California,
City and County of San Francisco—ss.

I, Mary T. Collins, a Notary Public in and for the City and County of San Francisco, State of California, do hereby certify:

That the witness in the foregoing deposition named, Leona Keener, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth, in the within-entitled cause; that said

(Deposition of Leona Keener.)

deposition was taken at the time and place therein named; that the testimony of said witness was taken down in shorthand by R. R. Roberson, a competent official shorthand reporter and a disinterested person, and by him thereafter reduced to longhand typewriting, under my supervision, and when completed, was carefully read to, or by, the said witness, and, being corrected by her in every particular she desired, was by her thereafter duly subscribed.

And I further certify that I am not of counsel or attorney for either of the parties to said deposition, nor in any way interested in the outcome of the cause named in said caption.

In Witness Whereof, I have hereunto set my hand and affixed my seal of office, this 26th day of October, one thousand nine hundred and forty-two.

[Notarial Seal] MARY T. COLLINS,

Notary Public in and for the City and County
of San Francisco, State of California.

My Commission expires March 30, 1945.

[Endorsed]: Filed Apr. 21, 1943. Walter B.
Maling, Clerk.

In the Superior Court of the State of California,
in and for the City and County of
San Francisco

No. 312,800

THOMAS H. WINGATE, as Receiver in Equity
for PACIFIC EMPIRE HOLDINGS, IN-
CORPORATED, a corporation of the State of
Delaware; and PACIFIC EMPIRE HOLD-
INGS, INCORPORATED, a corporation of
the State of Delaware,

Plaintiffs,

vs.

PETER BER CUT, ERNEST E. BER CUT,
HENRY BER CUT, JEAN BER CUT, MARY
DOE BER CUT, MARY JANE BER CUT,
FIRST DOE, SECOND DOE, THIRD DOE,
BLUE AND WHITE, a corporation, XYZ, a
copartnership,

Defendants.

DEPOSITION OF LLOYD R. ARNOLD

Be It Remembered, that pursuant to stipulation
between counsel for the respective parties, and on
Thursday, the 17th day of September, 1942, com-
mencing at the hour of 2:00 o'clock P. M. thereof,
at Room 816, No. 300 Montgomery Street, San
Francisco, California, before me, Mary T. Collins, a
Notary Public in and for the City and County of

(Deposition of Lloyd R. Arnold.)

San Francisco, State of California, personally appeared

LLOYD R. ARNOLD,

who, being by me first duly sworn, was thereupon examined and interrogated as a witness in said cause.

A. J. Scampini, Esquire, appeared as attorney for the plaintiffs; and Louis E. Goodman, Esquire, and Louis H. Brownstone, Esquire, appeared as attorneys for the defendants Peter Bercut, Ernest E. Bercut, Henry Bercut and Jean Bercut.

It was stipulated between counsel for the respective parties that the Notary Public, after administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that the said deposition should be reported in shorthand by R. R. Roberson, a competent official shorthand reporter and a disinterested person, and thereafter transcribed by him into longhand typewriting, to be read to, or by, the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

It was further stipulated that if the witness should be instructed not to answer questions propounded by counsel, in the absence of the Notary

(Deposition of Lloyd R. Arnold.)

Public, it shall be deemed that the Notary Public has so instructed the witness to answer, but that he still refuses to answer.

Mr. Scampini: Will it be stipulated, Mr. Goodman, that the deposition of L. R. Arnold is being taken on behalf of the plaintiffs pursuant to the usual stipulations, and that we are reserving all objections as to the form of the question—

Mr. Goodman: Except as to the form.

Mr. Scampini: (Continuing:) —except as to the form, rather, the objections to be presented at the time of the trial for ruling, if necessary; and that the Notary may swear the witness and that she may thereafter retire?

Mr. Goodman: Yes.

Mr. Scampini: And will it also be stipulated that if any of the questions are objected to and the witness refuses to answer, that the Notary would nevertheless direct the witness to answer, and that he still refuses to answer—all the usual stipulations?

Mr. Goodman: Yes, that is satisfactory.

Mr. Scampini: Now, Miss Collins, will you please swear the witness?

(The Notary Public administers the oath to the witness.)

Mr. Goodman: Mr. Reporter, will you please note, before we proceed with the taking of the depo-

(Deposition of Lloyd R. Arnold.)

sition, that the appearance by the defendants is without prejudice to their rights, and reserving the right to object to the maintenance of this suit, and without waiving any objection as to the capacity of the plaintiff or plaintiffs to maintain the action?

Mr. Scampini: Yes. I expected such a move. The reservation is perfectly in order.

LLOYD R. ARNOLD,

being duly sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Mr. Scampini: Q. Mr. Arnold, your full name is Lloyd R. Arnold? A. That is correct.

Q. And where do you presently reside, Mr. Arnold? A. 1980 Washington.

Q. And do you expect to be leaving the City and County of San Francisco shortly?

A. I hope to, yes.

Q. In the event that you should leave, will you keep us all advised as to your whereabouts, so that in the event any deposition is desired by either side the proper arrangements can be made?

A. I will, fully.

Q. Now, what is your present connection with Pacific Empire Holdings, Incorporated?

A. Well, I believe I am still vice-president and secretary.

(Deposition of Lloyd R. Arnold.)

Q. And are you a director?

A. Also a director.

Q. When did you first become connected with Pacific Empire Holdings?

A. Well, I'd say in 1929, I believe, the latter part—the first part of 1930.

Q. What was the name of the corporation at that time?

A. That was the Associated Calitalo Holdings, Ltd., Incorporated.

Q. Was it incorporated under the laws of Delaware? A. Delaware.

Q. And did the corporation Associated *Calito* Holdings thereafter, by procedure according to the laws of Delaware, change its name—its corporate name? A. It did change it to——

Q. Pacific Empire?

A. Pacific Empire Holdings, Incorporated. That was by amendment to the articles.

Q. It was still, however, the same corporation? Is that right? A. The same corporation.

Q. Did you know Peter Bercut when you first became associated with Pacific Empire Holdings or its predecessor, by name?

A. I don't believe that I knew him, no. I knew of him. I probably didn't actually make his acquaintance until whenever I first attended a Board meeting.

Q. Was he then connected with the corporation?

A. I believe he was.

(Deposition of Lloyd R. Arnold.)

Q. Do you recall what post, if any, he held at the time?

A. I am pretty sure he was a director at the time.

Q. Now, I show you here what appear to be Volumes I, III, IV and V of minute books (showing books to the witness), and incidentally—this is off the record.

(Unreported discussion.)

Q. I will ask you to take a look at Volume I of what appear to be the minute books of Associated *Calito* Holdings, Ltd., Incorporated, and ask you whether or not you recognize that and can testify as to whether or not it is the minute book of said corporation?

A. I can, yes.

Q. When did you first see that minute book?

A. Well, when I became secretary of the holding company.

Q. And when was it, Mr. Arnold, that you first became secretary of the holding company?

A. Without looking it up, why, I would say it was about 1933, I believe.

Q. Was the book that you now have in your hand delivered to you at that time as secretary of the corporation?

A. Yes, it was. I took over all the duties of secretary.

Q. Did you thereafter keep the minutes?

A. I did.

Q. Of the corporation?

A. I did.

(Deposition of Lloyd R. Arnold.)

Q. Now, I show you what appear to be Volumes III, IV and V of the same corporation, except as to its subsequent change of name, and ask you to look at them and see whether or not you identify them as the books which were kept by you as the minute books?

A. Yes, those are the minute books, yes. There is one missing there. That is over there—it must be.

Mr. Scampini: Volume II. Now, Mr. Reporter, will you please mark the minute books for the purpose of identification as “Plaintiffs’ Exhibit No. 1.”

(Said minute books marked “Plaintiffs’ Exhibits 1-A, 1-B, 1-C and 1-D.”)

Mr. Scampini: Q. Now, Mr. Arnold, at the beginning of Volume I of the minute books, you have what purports to be a copy of the articles of incorporation of Associated Calitalo Holdings, Ltd., Incorporated, together with amendments thereto, running from pages 1 to 20, inclusive, of Volume I of the minute book; and I will ask you whether or not the copy of the articles together with the amendments thereto found in this minute book are to your personal knowledge true and correct copies of the articles of incorporation?

A. They are correct. They were taken from the—I didn’t prepare those there, but they were taken from the certified articles we have in our files, yes.

Q. They have been in your files. All right. Then beginning with page 21 of Volume I, and ending with page 41, you have what purports to be a copy

(Deposition of Lloyd R. Arnold.)

of the by-laws of the corporation. Have you examined these by-laws?

A. I have from time to time, yes.

Q. Are these true and correct copies of the by-laws of the corporation?

A. To the best of my knowledge they are, yes.

Q. And on page 42 you have what appear to be amendments to the by-laws of the corporation?

A. Yes, that is a recapitulation—amendments that have been made subsequently.

Q. That is up to 44—pages 42 to 44 inclusive. Do they contain, to the best of your knowledge, all the amendments to the by-laws of the corporation?

A. They should, if they are kept up to date. I can't recall any after this. This is 1936. They should be all recapitulated there, but by chance some might have been missed.

Q. Now, at the time that you became connected with the company, do you recall whether or not the company at that time owned a block of shares in the Merchants Ice & Cold Storage Company, a California corporation?

A. When I came with the company, I don't believe that it owned it, no—I don't believe that it owned any shares in any degree of Merchants.

Q. Do you recall any subsequent acquisition of any shares in the Merchants Ice & Cold Storage Company by the company during this period?

A. That was just about the time I was coming

(Deposition of Lloyd R. Arnold.)

in, I would say, in nineteen—when I was made an officer of the company.

Q. Yes. A. 1933, I believe.

Q. Do you recall from whom the company acquired the shares of stock of Merchants Ice & Cold Storage Company?

A. Yes, it was acquired from a syndicate composed of four or five individuals.

Q. Can you name them?

A. I will make an attempt.

Q. Yes.

A. George Stratton, Frederick Vincent, a man by the name of Swanberg; Sherman—William A. Sherman; and I think a man by the name of McInerney.

Q. Joseph I. McInerney?

A. Joseph McInerney. I don't remember what his middle initial was.

Q. How about Florence Stratton?

A. Well, I don't believe as a part of that syndicate there. That came in later, I think.

Q. Now, at the time that this block of stock was acquired, was Peter Bercut, to the best of your knowledge, connected with the company, the Pacific Empire Holdings? A. I believe he was.

Q. I now show you what appears to be——

A. Bear in mind I just came to the company about that time. I would have to look at the minute book to verify that, but I assume he was.

Q. I now show you what appears to be the an-

(Deposition of Lloyd R. Arnold.)

nual meeting of stockholders of Associated Calitalo Holdings, Ltd.—the minutes of the meeting held at Wilmington, Delaware, on Wednesday, February 15, 1933, wherein it appears that you acted as secretary of the meeting, Mr. Arnold, and I will ask you whether or not you recall that meeting?

A. Yes, I recall that. That is Delaware. I think that was where I had to make a trip back there for that purpose.

Q. And I will ask you to look at the minutes on pages 66, 68, 69, and state whether or not you recall the election of Mr. Peter Bercut as a director of the corporation at said meeting. Is that your signature at the bottom? A. That is my signature.

Q. Who were elected directors at that meeting?

A. That was M. Maffei, L. R. Arnold, A. A. Heer, James Bernardini, and Luigi Giachino, Peter Bercut, and George Hope.

Mr. Goodman: George Hope?

A. Hope—H-o-p-e. That is Dr. George Hope.

Mr. Scampini: Q. I now ask you if you look at the minutes of a special meeting of the Board of the Associated Calitalo Holdings, Ltd. on March 2nd, 1933, the organization meeting following the meeting concerning which you have just testified, upon which it appears that you acted as secretary for said meeting. A. That is right.

Q. State whether Mr. Peter Bercut was elected to any office at said meeting?

A. He was elected second vice-president.

(Deposition of Lloyd R. Arnold.)

Q. Who was elected president?

A. Mr. Maffei was president.

Q. And who was——

A. A. A. Heer first vice-president; Peter Bercut second vice-president; and L. R. Arnold secretary-treasurer.

Q. Was an executive committee appointed at said meeting?

A. Yes, an executive committee was appointed.

Q. Consisting of whom?

A. M. Maffei, L. R. Arnold, and A. A. Heer.

Q. I will now ask you to take a look at page 166 of the minute book, purporting to be the minutes of the annual stockholders' meeting held in 1934 at Wilmington, Delaware, at which meeting you appear to be secretary, and ask you whether or not you recognize those minutes and recall that meeting?

A. Yes, I recall this.

Q. Who were elected directors at that meeting?

A. It is the identical Board, the same as the previous.

Q. As you have previously testified?

A. Yes.

Q. By the meeting of 1933—is that right?

A. That is right.

Q. Now, at the next organization meeting of the Board, the minutes found on page 175, who were elected officers?

A. M. Maffei, president; A. A. Heer, Jr., first vice-president; Peter Bercut, second vice-president; and L. R. Arnold, secretary-treasurer.

(Deposition of Lloyd R. Arnold.)

Q. And when was that meeting held?

A. That was held on February 19th, 1934.

Q. Was an executive committee appointed?

A. The same executive committee—M. Maffei, Arnold and Heer—that I have testified to before.

Q. Now, will you take a look at page 38 of Volume IV of the minute books, which deals with the annual stockholders' meeting held Friday, the 15th day of February, 1935, and state who were elected directors at said meeting.

A. That is the identical Board.

Q. As the one that had previously been serving—is that correct? A. That is correct.

Q. Now, at the organization meeting of said Board, held February 19th, 1935, who were elected officers?

A. M. Maffei, president; L. R. Arnold, first vice-president and secretary; Peter Bercut, second vice-president, and A. A. Heer, Jr., treasurer and assistant secretary.

Q. And who were elected members of the executive committee?

A. The executive committee was M. Maffei, L. R. Arnold and Peter Bercut.

Q. Now, I want you to take a look at the minutes found on pages 52 and 53, and ask you whether or not you recognize the signatures of the persons who appear to have approved those minutes found on pages 52 and 53 thereof?

A. Yes, I recognize them.

(Deposition of Lloyd R. Arnold.)

Q. Whose signatures are on page 53?

A. I acted as secretary, and M. Maffei was chairman of the committee. I signed again as a member, and Peter Bercut signed as a member.

Q. And that is Mr. Peter Bercut's signature?

A. Yes.

Mr. Goodman: That is an executive committee meeting, is it?

Mr. Scampini: That is an executive committee meeting, yes.

Mr. Goodman: What date was it?

Mr. Scampini: That was Wednesday, May 8th, 1935.

Q. Now, will you examine those minutes and state whether or not you recall the transaction therein referred to dealing with a certain transaction with Joseph I. McInerney and Pacific Empire Corporation? A. Yes, I recall that.

Q. You recall that transaction, wherein and whereby— A. I recall the transaction.

Q. Was the transaction referred to in those minutes, approved by the executive committee, thereafter consummated? A. Yes, it was.

Mr. Goodman: May I see that? (Examining minute book.)

Mr. Scampini: Q. Now, will you examine the exhibits—Exhibit A, which is found on pages 54, 55 and 56, together with a memorandum of securities pledged, entitled, "Stock of Merchants Ice & Cold Storage Company" and "Stock of Pacific National

(Deposition of Lloyd R. Arnold.)

Bank of San Francisco," found on page 58, and state whether or not that is a copy of the contract authorized to be executed by the minutes of the executive committee meeting concerning which you have just testified, held May 8th, 1935?

A. It must be. Let me see it. (Examining minutes.) Yes, that is right—that is correct.

Q. Now, were those shares of stock referred to in Exhibit A, found in the minutes there, at that time the property of the Merchants Ice & Cold Storage Company—of Pacific Empire Holdings?

A. Yes, they were.

Q. What is the date of that meeting there, Mr. Arnold?

Mr. Goodman: May 8th, 1935.

A. May 8th, 1935.

Mr. Scampini: All right.

Q. I now show you here a document entitled "Assignment by way of pledge," entered into between Pacific Empire Corporation and Pacific Empire Holdings, with respect to 49,944 $\frac{1}{3}$ shares of common stock and 3,990 shares of preferred stock of Merchants Ice & Cold Storage Company, and ask you to look at it and state whether or not that is the original agreement of pledge referred to in those minutes? (Showing document to the witness.)

A. Yes, that is correct.

Q. That is the original—is that right?

A. That is the original.

Q. And is that your signature found on that?

(Deposition of Lloyd R. Arnold.)

A. That is my signature on that.

Q. Are those the seals of both corporations on that?

A. Yes, that is right.

Q. And what position did you hold with the Pacific Empire Corporation at that time?

A. The Pacific Empire Corporation?

Q. Yes.

A. I wasn't with the Pacific Empire Corporation.

Q. Weren't you then? A. No.

Q. Do you know what Pacific Empire Corporation was at that time?

A. Well, it was about a 52 or 55% owned subsidiary.

Q. Of what?

A. Of Pacific Empire Holdings.

Q. And Pacific Empire Corporation was a California corporation?

A. Yes, a California corporation.

Q. And at that time—that is, the date upon which this contract bears date—you say that a majority of its outstanding capital stock was owned by Pacific Empire Holdings? Is that right?

A. That is correct.

Q. Do you know who were the officers of the corporation, the Pacific Empire Corporation, at that time?

A. M. Maffei was president and A. A. Heer was secretary. I am trying to think of who the vice-

(Deposition of Lloyd R. Arnold.)

presidents were. I believe Mr. Bercut was a vice-president. I would have to look it up.

Q. Do you know who the directors were?

A. The directors were M. Maffei, A. A. Heer, Peter Bercut, Webb Richards, and the fifth one I can't say.

Q. Was Mr. Scampini a director of the Pacific Empire Corporation at that time?

A. You were a director at one time. I didn't know whether you had resigned at that time or not.

Q. I resigned directly afterwards—or shortly afterwards. At any rate, you do recall that Mr. Peter Bercut was a director of that company?

A. Yes, he was a director.

Q. And you don't know for sure whether he was an officer of the Pacific Empire Corporation?

A. I don't know for sure. I would have to look that up.

Mr. Scampini: Now, I will ask that this be marked "Plaintiffs' Exhibit 2" for purposes of identification.

(Said document marked "Plaintiffs' Exhibit 2 for identification.")

Q. Now, Mr. Arnold, pursuant to this assignment by way of pledge, executed by Pacific Empire Holdings, Inc., in favor of Pacific Empire Corporation, do you know whether or not the shares of stock therein referred to were delivered over and placed on pledge with the Pacific Empire Corporation?

(Deposition of Lloyd R. Arnold.)

A. I don't recall the incident, but I assume they should have been—they would have been.

Q. Now, I will ask you to take a look at the minutes found on pages 64 and 65 of Volume IV of the minute books, and ask you whether you recognize the signatures of the assenting members of the executive committee?

A. Yes, I do.

Q. Who are they?

A. Mr. Maffei, L. R. Arnold, and Peter Bercut.

Q. Will you please read the minutes, or look at them, and state whether or not you recall the authentication found therein to borrow the sum of \$50,000.00 from the Pacific Empire Corporation?

Mr. Goodman: What is the date of that?

A. That is May 17th, 1935. Yes, I do.

Mr. Scampini: Q. And was the money thereafter borrowed from the Pacific Empire Corporation by Pacific Empire Holdings?

A. Yes, that and more.

Q. And more. And were the shares of stock described in this assignment by way of pledge, which is now Exhibit 2 for identification, these shares of stock delivered to the Pacific Empire Corporation as security for the payment of that \$50,000.00 and any other borrowings that may thereafter have taken place?

A. I didn't get the finish of that sentence there.

Q. I will withdraw the question and see if I can make it clear. Were the shares of stock re-

(Deposition of Lloyd R. Arnold.)

ferred to in the agreement entitled "Assignment by way of pledge"— A. Yes.

Q. (Continuing) —which were by this agreement pledged to Pacific Empire Corporation—were they turned over to the Pacific Empire Corporation as security for the repayment of this sum of \$50,000.00?

A. Yes, that was the purpose of it.

Q. That was the purpose of it. Now, I will ask you whether or not you recall, as a director of the Pacific Empire Holdings, and vice-president and secretary, whether or not the holding company ever thereafter borrowed any additional sum from Pacific Empire Corporation?

A. Oh, yes, we did.

Q. And as of, say, July 1st, 1942, approximately how much was the indebtedness of Pacific Empire Holdings to Pacific Empire Corp.?

A. I don't know about the exact date, but it has always been up above, in recent years, a hundred thousand; it must have been up around a hundred and fifty thousand, I guess.

Q. Now, did the holding company ever pay the Pacific Empire Corp. at any time its indebtedness then owing from the very beginning, when you borrowed this \$50,000.00, right down to the present date?

A. No, other than we may have made payments, you know. I don't know, but we certainly didn't pay—

(Deposition of Lloyd R. Arnold.)

Q. Did Pacific Empire Corp. ever release to Pacific Empire Holdings its pledge created by virtue of this assignment which was given to it to secure the payment of money borrowed by it from the holding company?

Mr. Goodman: Just a minute. I will object to that as going to the form of the question, on the ground it calls for the opinion and conclusion of the witness.

Mr. Scampini: Well, all right. That can be proven from the other end of it anyway.

Q. I will now ask you, Mr. Arnold, to take a look at the minutes found on page 119 of Volume IV, which deals with the stockholders' meeting of the corporation, which appears to have been held, under your signature, on the 15th day of February, 1936. The minutes begin at page 114 and end at page 119. Will you please state who were elected directors for the ensuing year of Pacific Empire Holdings? A. The same Board.

Q. The same Board?

A. That I have listed before.

Q. Will you now take a look at the organization meeting of this Board, which took place on February 19th, 1936, and state who were elected officers and members of the executive committee?

A. The officers were M. Maffei, president; myself, first vice-president and secretary; Peter Bercut, second vice-president; and A. A. Heer, Jr., treasurer and assistant secretary. The executive

(Deposition of Lloyd R. Arnold.)

committee was the same, M. Maffei, L. R. Arnold, and Peter Bercut.

Q. I will now ask you to take a look at the minutes which appear—the minutes of the annual meeting of stockholders held on February 15th, 1937, the minutes beginning on page 176, and ending on page 180 of Volume IV, and state whether or not—state who were elected directors at that meeting for the ensuing year?

A. It looks like there was a change here. Do you want me to list them all here?

Q. Yes.

A. There is one difference. Maffei, Arnold, Heer, Bernardini, Giachino, Bercut and Ryerson.

Mr. Goodman: Ryerson instead of Hope?

Mr. Scampini: Yes, Ryerson instead of Hope.

Q. Now, take a look at the following minutes dealing with the organization meeting of the board of directors held——

A. March 10th.

Q. March 10th, 1937.

A. 1937, yes.

Q. And state who were elected officers and members of the executive committee?

A. The officers were the same—M. Maffei, president; L. R. Arnold, first vice-president and secretary; Peter Bercut, second vice-president; A. A. Heer, treasurer and assistant secretary. The executive committee is the same—Maffei, Arnold and Bercut.

Q. I will ask you to take a look at page 1 of Volume V, which appears to be a waiver of notice of special meeting of the board of directors of Pa-

(Deposition of Lloyd R. Arnold.)

cific Empire Holdings, Incorporated, calling a meeting on June 15th, 1937, and ask you to look at the signatures appearing thereon and see if you recognize Peter Bercut's signature there?

A. Yes, I do.

Q. Now, I will ask you to take a look at the minutes which are found on—the minutes of the executive committee meeting held July 22nd, 1937, at 26 O'Farrell Street, and ask you whether or not you recall that meeting, and whether or not the signatures appearing thereunder as members of the executive committee approving said minutes—whether you will find among them Peter Bercut's signature?

A. The signatures are all right. I can see that. I don't know whether I recall the meeting. Let's see. (Examining minute book.)

Q. You recall that meeting? A. Yes.

Q. Now, take a look at page 23, which deals with the minutes of the annual meeting of stockholders held on February 15th, 1938, and ending on page 28, and state who were elected directors for the ensuing year?

A. Now, there is another change here, apparently. M. Maffei, Heer, Arnold, Giachino, Richards—Webb Richards takes—

Q. Bernardini's place?

A. Bernardini's place, yes; Peter Bercut; T. M. Ryerson.

Q. And the following minutes of the organiza-

(Deposition of Lloyd R. Arnold.)

tion meeting, which was held on February 21st, 1938—look at those and state who were elected officers and members of the executive committee.

A. Well, the officers were M. Maffei, president; myself, first vice-president and secretary; Peter Bercut, second vice-president; A. A. Heer, Jr., treasurer; and J. M. DeVleig, who was assistant treasurer; and L. Garwood, assistant secretary.

Q. Who were elected members of the executive committee? A. That is the same committee.

Q. The same committee as before—is that right?

A. Yes.

Q. I will now ask you to take a look at the minutes of the executive committee for the meeting held February 25th, 1938, and ask you whether or not you recognize the signature of Peter Bercut as one of the members present approving the minutes?

A. I recognize them all, yes.

Q. I will now ask you to take a look at the minutes of the special meeting of the executive committee held March 21st, 1938, at which meeting it appears that Maffei, Arnold and Peter Bercut were present, and I ask you to look at page 38 thereof and state whether or not Mr. Peter Bercut approved in writing the said minutes?

A. That is correct.

Q. I will now ask you to take a look at the special meeting, the minutes of the special meeting of the board of directors held November 12th, 1938, and state whether or not you recall the transaction

(Deposition of Lloyd R. Arnold.)

therein referred to, and state whether or not Peter Bercut was present at that meeting?

A. Well, in the first instance he was listed as present.

Q. Was anybody listed as absent?

A. T. M. Ryerson. Yes, I recall now.

Q. Was the transaction therein referred to thereafter consummated?

A. There are two or three different ones. I believe they all were, yes.

Q. I now want you to take a look at the minutes which appear on pages 55 to 60 inclusive of Volume V, dealing with the minutes of the annual meeting of the stockholders held Wednesday, February 15th, 1939, and state who were elected directors at that meeting?

A. Maffei, Heer, Arnold, Giachino, Richards, Bercut, and Ryerson. The same ones as previously were.

Q. And the minutes of the special meeting of the newly elected Board held February 15th, 1939, state who were elected officers and members of the executive committee.

A. M. Maffei, president; L. R. Arnold, first vice-president and secretary; Peter Bercut, second vice-president; A. A. Heer, Jr., treasurer. That is the same committee again.

A. I now ask you to take a look at the minutes of the executive committee meeting held June 26th,

(Deposition of Lloyd R. Arnold.)

1939, and state whether or not at that meeting you recall Mr. Peter Bercut being present?

A. Yes, I do. He is listed. He must have been.

Q. Do you recall the financial report sent out to the stockholders or approved at said meeting for the purpose of being sent out to the stockholders, dealing with the financial condition of the company as of December 31st, 1938?

A. Yes, that is our printed report.

Q. And who prepared this report, this financial report of Pacific Empire Holdings?

A. I believe I prepared the report, and Mr. Heer prepared the balance sheet.

Q. Did the executive committee approve this report and authorize it to be sent out to the stockholders?

Mr. Goodman: Just a minute. Is that in the minutes?

Mr. Scampini: That is in the minutes.

Mr. Goodman: All right. It speaks for itself.

Mr. Scampini: All right.

Q. Now, I notice in this report dated December 31st, 1938, that the common stock of the Merchants Ice & Cold Storage Company is given a valuation of \$522,638.25, and the preferred stock of the Merchants Ice & Cold Storage Company is given a valuation of \$118,265.66. Mr. Arnold, how did you arrive at those figures?

A. Well, the first one is par—preferred stock, I mean. That is par; it must have been—well, as it

(Deposition of Lloyd R. Arnold.)

states, that is a book value based on the Haskins & Sells report.

Q. Is that the book value of the stock?

A. Well, I will read it to you:

“Valuation based upon the value stated by the audited balance sheet of Merchants Ice & Cold Storage Company, as of December 31st, 1938, as prepared and certified to by Messrs. Haskins & Sells, certified public accountants.”

Q. In other words, you took the valuations placed on these shares by the auditors' report of the Merchants Ice & Cold Storage Company as of December 31st, 1938, and transferred those values as the current value for these shares on the books of the Pacific Empire Holdings? Is that right?

A. That is right. That was according to our practice.

Q. I will ask you now to look at the minutes which appear on pages 79 to 83 inclusive of Volume V, dealing with the annual stockholders' meeting held at Wilmington, Delaware, on February 15th, 1940, and state who were elected directors for the ensuing year?

A. That same Board as the previous year, yes.

Q. And the minutes of the special meeting of the newly elected Board on February 15th, 1940—state who were elected officers and members of the executive committee?

A. The same officers as the previous year. No change.

(Deposition of Lloyd R. Arnold.)

Q. The same members of the executive committee? A. The same members, yes.

Q. I will now ask you whether since February 15th, 1940, there have ever been held any other stockholders' meetings? A. 1940?

Q. Yes.

A. Wait a minute. This is '42—let me see—we couldn't get a quorum in '41—no.

Q. And was the 1941 meeting adjourned from time to time for the purpose of obtaining a quorum?

A. Yes.

Q. And has a quorum ever been obtained since the last meeting on February 15th, 1940?

A. No, it has not.

Q. I will now ask you whether or not on or about January 8th, 1941, a transaction took place wherein and whereby Peter Bercut purported to purchase from Pacific Empire Holdings certain shares of Merchants Ice & Cold Storage Company. Do you recall any such transaction or occurrence?

A. I do.

Q. Now, at that time—— Strike that out, please. Take a look at the document which I now hand you, and which purports to be a copy of a certain agreement. (Handing document to the witness.)

A. Yes, I recognize it.

Q. What is that document which you have in your hand?

A. Well, it is a letter addressed by the company.

Q. What company?

(Deposition of Lloyd R. Arnold.)

A. By the Pacific Empire Holdings to Mr. Bercut.

Q. Under what date?

A. Under date of January 8th, 1941.

Q. Now, at that time was Mr. Peter Bercut an officer or director or member of the executive committee of the Pacific Empire Holdings?

A. Yes, I believe he was.

Q. And state whether or not the original of that letter was sent by the company, or was sent to Mr. Peter Bercut.

A. It was either sent or given to him.

Q. Given to him. Who signed it?

Mr. Goodman: No, he didn't say that. He said it was sent or given.

Mr. Scampini: Yes, sent or given.

A. Pardon?

Mr. Goodman: I just wanted to see that the reporter got it correctly.

Mr. Scampini: Q. Now, who signed for the holding company?

A. M. Maffei signed as president, and I signed as secretary.

Q. And do you have any executed copy of that so-called letter in your file, signed by either of the officers that you have mentioned, or by Peter Bercut?

A. There must be one in the file somewhere.

Q. Do you recognize that copy?

A. Yes, I recognize the copy—yes, sir.

(Deposition of Lloyd R. Arnold.)

Q. Is that a true copy of the letter?

A. I dictated it myself.

Q. Is that a true copy of the letter which you say was either mailed or delivered to Mr. Peter Bercut?

A. Yes, it is the copy.

Q. Now, at the time that the letter bears date was Mr. Peter Bercut a director of the Merchants Ice & Cold Storage Company?

A. Yes.

Q. At that time did the Pacific Empire Holdings own the controlling interest of the Merchants Ice & Cold Storage Company? And by that I mean did it own enough shares to control the election of its board of directors?

A. Yes, it did.

Q. Did it own more than 50% of the voting power of the Merchants Ice & Cold Storage Company?

A. Yes.

Q. Who caused Mr. Peter Bercut to be elected to the board of directors of the Merchants Ice & Cold Storage Company?

Mr. Goodman: I think that question is objectionable on the ground it calls for the opinion and conclusion of the witness.

Mr. Scampini: Q. Well, you answer it, and then the Court will rule on it. Who caused the election of Mr. Peter Bercut to the board of directors of the Merchants Ice & Cold Storage Company?

A. I believe we did—the holding company.

Q. The holding company. Now, at that time—that is, on or about January 8th, 1941—did the holding company own a substantial block of stock of

(Deposition of Lloyd R. Arnold.)

Pacific National Bank of San Francisco—or Pacific Empire Corporation, its subsidiary?

A. Well, through its subsidiary, the Pacific Empire Corporation, it did, yes.

Q. At that time was Mr. Peter Bercut an officer or director of the Pacific Empire Corp., on January 8th, 1941?

Mr. Goodman: I will object to that unless it can be shown that the witness knows of his own knowledge.

Mr. Scampini: Q. That is, of your own knowledge.

Mr. Goodman: As officer or director.

A. I believe he was.

Mr. Scampini: Q. Were you an officer or director of the Pacific Empire Corp. on January 8th, 1941?

A. Yes, I was, yes.

Q. Do you recall whether or not—do you know whether or not at that time Mr. Peter Bercut was an officer or director of that company?

A. He was a director. I am not certain on the other part of it. I will have to look it up.

Q. Was Mr. Maffei at that time the president of the Pacific Empire Corp.?

A. Yes, he was.

Q. Now, was Mr. Peter Bercut, if you know of your own knowledge, on January 8th, 1941, a director of Pacific National Bank of San Francisco?

A. Yes, he was.

Q. Do you know how Mr. Peter Bercut became

(Deposition of Lloyd R. Arnold.)

Q. Is that a true copy of the letter?

A. I dictated it myself.

Q. Is that a true copy of the letter which you say was either mailed or delivered to Mr. Peter Bercut?

A. Yes, it is the copy.

Q. Now, at the time that the letter bears date was Mr. Peter Bercut a director of the Merchants Ice & Cold Storage Company?

A. Yes.

Q. At that time did the Pacific Empire Holdings own the controlling interest of the Merchants Ice & Cold Storage Company? And by that I mean did it own enough shares to control the election of its board of directors?

A. Yes, it did.

Q. Did it own more than 50% of the voting power of the Merchants Ice & Cold Storage Company?

A. Yes.

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A. I believe we did—the holding company.

Q. The holding company. Now, at that time—that is, on or about January 8th, 1941—did the holding company own a substantial block of stock of

(Deposition of Lloyd R. Arnold.)

Pacific National Bank of San Francisco—or Pacific Empire Corporation, its subsidiary?

A. Well, through its subsidiary, the Pacific Empire Corporation, it did, yes.

Q. At that time was Mr. Peter Bercut an officer or director of the Pacific Empire Corp., on January 8th, 1941?

Mr. Goodman: I will object to that unless it can be shown that the witness knows of his own knowledge.

Mr. Scampini: Q. That is, of your own knowledge.

Mr. Goodman: As officer or director.

A. I believe he was.

Mr. Scampini: Q. Were you an officer or director of the Pacific Empire Corp. on January 8th, 1941?

A. Yes, I was, yes.

Q. Do you recall whether or not—do you know whether or not at that time Mr. Peter Bercut was an officer or director of that company?

A. He was a director. I am not certain on the other part of it. I will have to look it up.

Q. Was Mr. Maffei at that time the president of the Pacific Empire Corp.?

A. Yes, he was.

Q. Now, was Mr. Peter Bercut, if you know of your own knowledge, on January 8th, 1941, a director of Pacific National Bank of San Francisco?

A. Yes, he was.

Q. Do you know how Mr. Peter Bercut became

(Deposition of Lloyd R. Arnold.)

elected to the board of directors of the Pacific National Bank of San Francisco, and when?

Mr. Goodman: Well, I will object to that as calling for the opinion and conclusion of the witness, and the proper foundation hasn't been laid.

Mr. Scampini: Q. Will you answer the question? A. Did you say to answer it?

Q. Yes. The objection is reserved.

A. I guess you will have to ask me that again.

Q. Do you know when Mr. Peter Bercut was elected to the board of directors of Pacific National Bank of San Francisco—approximately when?

Mr. Goodman: The same objection.

A. I believe it was sometime—at the annual meeting in '40, but—yes, 1940, I believe.

Mr. Scampini: Q. Who caused his election to the board of directors of the Pacific National Bank of San Francisco to be made?

Mr. Goodman: The same objection.

Mr. Scampini: Q. If you know?

A. The corporation did, I assume.

Q. What corporation?

A. The Pacific Empire Corporation.

Q. Did you as an officer of the Pacific Empire Corporation or Pacific Empire Holdings cause the shares of stock owned by the Pacific National—by the two companies in the Pacific National Bank of San Francisco to be voted in favor of the election of Peter Bercut to the board of directors of the Pacific National Bank of San Francisco?

A. We did, yes. It was our policy.

(Deposition of Lloyd R. Arnold.)

Q. Now, did you during all this period of years concerning which you have testified now—did you at all times discuss the affairs and activities of Pacific Empire Holdings with Mr. Peter Bercut?

A. Yes.

Q. Did you keep him advised as to the condition, financial or otherwise, of the corporation during that period of time?

A. Well, it is very evident there that we did, yes.

Mr. Goodman: Well——

Mr. Scampini: Q. Well, answer “Yes” or “No,” if you know. A. Yes, we did.

Q. Did you request Mr. Peter Bercut to become a director of the Merchants Ice & Cold Storage Company? A. I believe we asked him to, yes.

Q. Did you advise him of the condition of the Merchants Ice & Cold Storage Company when he became a director? Was he kept aware of its condition, to your knowledge?

A. Well, I believe he must have known the condition of the Merchants, yes.

Q. Don't say you believe. Just say whether you know or not. Do you know whether or not you advised and kept Mr. Bercut informed as to the condition of the Merchants Ice & Cold Storage Company?

A. Well, yes, he was advised of their condition.

Q. Now, in or about December, of 1940, were you the president of Merchants Ice & Cold Storage Company? A. Yes.

(Deposition of Lloyd R. Arnold.)

Q. Was Mr. Maffei an officer of the Merchants Ice & Cold Storage Company? A. Yes.

Q. What was he?

A. He was a vice-president and director.

Q. Was Mr. Peter Bercut an officer of the Merchants Ice & Cold Storage Company?

A. I believe he was only a director.

Q. Do you know whether or not he was a second vice-president?

(No answer.)

Q. If you don't know, just say you don't know.

A. I would have to look it up. I don't know.

Q. All right. Now, on or about that time did the Pacific Empire Holdings owe some money to Merchants Ice & Cold Storage Company?

A. Yes, we did.

Q. Now, from 1933 to the end of 1940, is it true or is it not true that Pacific Empire Holdings and Pacific Empire Corporation from time to time loaned various sums of money to Merchants Ice & Cold Storage Company for use by it as working capital, and for its business?

A. We most certainly did.

Q. And on several occasions is it not true that Pacific Empire Corporation and Pacific Empire Holdings advanced money to Merchants Ice & Cold Storage Company for the purpose of enabling the latter to meet its bonded indebtedness as it came due? A. On several occasions.

Q. Now, from the converse end of it, did from

(Deposition of Lloyd R. Arnold.)

time to time Merchants Ice & Cold Storage Company lend money to Pacific Empire Holdings or Pacific Empire Corporation?

A. Yes, it did.

Q. There was, in other words, a series of transactions back and forth between the holding company and its subsidiaries? Is that right?

A. That is right.

Q. And the Merchants Ice & Cold Storage Company at that time was a subsidiary of Pacific Empire Holdings, wasn't it? A. Yes.

Mr. Goodman: That calls for his opinion and conclusion.

Mr. Scampini: All right.

Q. At that time they held a controlling interest in it?

A. We held a majority—the controlling stock, anyway.

Q. All right. Now, on or about December 31st, 1940, did the holding company have urgent need of cash for some reason?

A. Yes, very much so.

Q. And at that time what did the holding company own by way of assets?

A. We still owned the controlling interest in the Merchants, the controlling interest in the Pacific Empire Corporation, and still had our interest in the laundry at Bakersfield. That is about all of any importance, I guess.

Q. Now, did the assets—strike that out, please.

(Deposition of Lloyd R. Arnold.)

Did the ownership of the holding company in Merchants Ice & Cold Storage Company on December 31st, 1940, if you know, exceed by more than 50% the aggregate value of all of its assets?

Mr. Goodman: Well, I will object to that on the ground the proper foundation hasn't been laid.

Mr. Scampini: Q. What values were placed on Merchants Ice & Cold Storage Company on the books of the holding company as of December 31st, 1940, Mr. Arnold?

A. I believe that is the same statement I was looking at. (Indicating in the minutes.) Well, I would say it was near—the book value shown was near a half million dollars, or a little under.

Q. All right. What values were placed on the holdings of the holding company in Pacific Empire Corp.?

A. Let me see the balance sheet here. (Referring to minute book.)

Q. What are you reading from?

A. There must be a later one. This is 1938.

Q. Was there any subsequent audit to 1938?

A. There should be another balance sheet, I would think. This is 1938. Well, there isn't very much here.

Q. Were there any substantial, material changes between 1938 and 1940, that you know of?

Mr. Goodman: Well, of course, the record is the best evidence of that.

(Deposition of Lloyd R. Arnold.)

A. The bank account is about the same. This happened to be a consolidated statement.

Mr. Scampini: All right. We will let that go. We will have some trouble on the trial. I want you to identify the ledger books while you are here. We will prove it by the ledger books.

Q. Then what happened on or about January of 1941 with regard to the stock of the Merchants Ice & Cold Storage Company?

A. Well, at that time we were negotiating for its sale.

Q. What do you mean by negotiating for its sale—"we"?

A. When I say "we", I mean the Pacific Empire Holdings.

Q. Well, did you ever obtain any consent from them to negotiate its sale?

Mr. Goodman: I will object to that as calling for the opinion and conclusion of the witness.

Mr. Scampini: I will instruct him to answer, and then we will let the Court decide it.

A. I don't believe I did in any formal way, no.

Q. Well, did you ever authorize—did the Board of Directors have a meeting as a Board, or did you ever call a meeting of the Board to authorize you—

A. No, I didn't.

Q. Did you ever call a meeting of the executive committee of the Board to authorize the sale of the Merchants Ice & Cold Storage stock?

A. No.

Q. Did you ever ask the stockholders of the

(Deposition of Lloyd R. Arnold.)

company to authorize the sale by the company of the stock? A. No.

Q. And what do you mean by "we", when you said "we negotiated its sale"?

A. I mean that we—that Mr. Maffei and myself on behalf of the holding company were endeavoring to work out a plan where—well, that would help and more or less save both companies, you might say.

Q. Well, now, what did you do pursuant to that intention?

A. Well, we opened the subject up for discussion with one or two places.

Q. Where did you open it up?

A. We discussed it at length with Mr Gaither over at the Pacific National, and of course discussed it with Mr. Bercut; in other words, the financial——

Q. When did you first start to discuss it with Mr. Bercut?

A. It must have covered a period of thirty or sixty days, I guess.

Q. Who conducted the negotiations with Mr. Bercut?

A. Most of them were conducted by myself.

Q. What were you at that time in the company?

A. Vice-president and secretary.

Q. What was Mr. Bercut at that time?

A. Vice-president.

(Deposition of Lloyd R. Arnold.)

Q. Did Mr. Maffei sit in during any of the negotiations?

A. Mr. Maffei was there on occasions. He was fully informed.

Q. Was anybody else kept fully informed on the Board of Directors, of these negotiations?

A. Well, Mr. Heer was a director; he was in my next office, yes.

Q. Well, what did you say to Mr. Heer?

A. He was informed of the negotiations.

Q. Well, what did you say to him?

A. I presume I kept him up to date on the details of the negotiations.

Q. Did you ever ask him for his opinion?

A. We all exchanged opinions, yes.

Q. Did he express any opinions?

A. I don't recall whether he expressed any or not. We were all of the opinion that the transaction along the lines we were endeavoring to work out had to be made.

Q. What do you mean—"had to be made"?

A. Because the financial condition of Merchants and the holding company made it necessary.

Q. Well, what was the financial condition of the holding company which made it necessary that you have this transaction?

A. Well, our loans had been criticized over at the Pacific National.

Q. What loans?

A. The loans of the holding company.

(Deposition of Lloyd R. Arnold.)

Q. Yes.

A. We had a big government suit against us on the revenue stamp tax, and there were other obligations pressing.

Q. And was the financial condition of the Merchants involved, too, at that time?

A. Yes, the financial condition of the Merchants was very much involved at that time.

Q. Well, now, what did you say to Mr. Peter Bercut when you first opened the subject to him?

A. Well, I don't know as I can give my exact words.

Q. Well, give the best recollection that you have.

A. Well, we approached Mr. Bercut, or I did—either Mr. Maffei or myself. I believe I did.

Q. What did you approach him for?

A. For the purpose of—well, at that time we were endeavoring to work out some sort of an association with some one who had certainly more credit than we had.

Q. What do you mean—"we had"?

A. The Pacific Empire Holdings and the Merchants Ice & Cold Storage Company, both of them. We were at about the end of our situation so far as credit was concerned and so far as obtaining sufficient cash to meet our commitments, and we were endeavoring to associate ourselves with some partnership arrangement.

Q. With whom?

A. In this instance with Mr. Bercut.

Q. What do you mean by "partnership arrangement"?

(Deposition of Lloyd R. Arnold.)

A. Well, the Merchants was badly in need of financial assistance, and we were at the end of our rope and we couldn't supply any.

Q. You mean you couldn't supply any more capital to the Merchants?

A. No more—no more capital; either the holding company or——

Q. By that you mean the holding company?

A. The holding company. The corporation had done that in previous years, but we were not able to do that any more.

Q. Yes. So what did you suggest to Mr. Peter Bercut?

A. Well, I believe our conversation started out with the idea of selling part of our holdings in the Merchants.

Q. To whom? A. To Mr. Bercut.

Q. And what did he say to you?

A. Well, then we entered into our discussions and negotiations, and gave him——

Q. What did he say?

A. (Continuing) ——and gave him financial statements, and things of that character. I believe—I believe during the negotiations one of his men looked over the situation.

Q. Which situation?

A. The condition of Merchants; and in fact I believe I talked to him myself in my office uptown and gave him statements and information.

Q. Now, what did you say first? When you first

(Deposition of Lloyd R. Arnold.)

opened it up to him, what did you propose to him?

A. Just as I said before.

Q. Well, you haven't said much. What did you propose to him?

A. Well, I proposed to him—I believe our first conversations were——

Q. I will get the facts, you know, sooner or later, so let's get all the facts.

A. All right. I am trying to give them to you. I am not hiding anything. All right, now, I will start over. I contacted Mr. Bercut and discussed the entire situation in a general way.

Q. Well, I still don't know what you mean by "the entire situation." Which situation and whose situation?

A. I reviewed at the same time the condition of Merchants, the condition of the holding company, and the situations making it necessary that we, the holding company, enter into some sort of a negotiation where we could receive financial help.

Q. All right. What did he say to you?

A. Well, he wanted to know the story, so we—there was naturally more than one conversation; there were several. We mostly went into the affairs of Merchants at that time. I told him about the amount of money that was owing by the holding company, and certain losses that were just coming to a head in connection with the Merchants accounts. I believe Mr. Bercut knew of the difficulties we were having with the bondholders. That covered about all.

(Deposition of Lloyd R. Arnold.)

Q. Now, just a moment. The bonds had been paid right along in the Merchants, had they not?

A. Yes, but we were in a technical violation.

Q. You were in a technical violation with the Merchants?

A. The Merchants, yes.

Q. I see. Now, Mr. Peter Bercut was at that time a director of Merchants, was he not?

A. Yes, sure.

Q. All right. Go ahead.

A. In other words, we were having some serious differences and difficulties in the Board meetings, and we were exchanging letters with the trustee for the Merchants bond issue. Other conditions bringing this about were—when we had consolidated—when the Merchants had consolidated its loans from the Anglo—we had previously changed our banking from the Anglo and the Bank of America under pressure to the Pacific National Bank, where we thought we would have ample credit. However, owing to the fact that the holding company also was obligated to the Pacific National the banking department later ruled that both loans were interlocking, and consequently that cut the line of credit of the Merchants just about in half. In fact, our situation so far as credit was concerned was so serious that we had to go out to finance companies and finance some of our paper.

Q. All right. What did you propose to Mr. Bercut?

A. The original discussions were along the lines

(Deposition of Lloyd R. Arnold.)

of the holding company selling part of its stock—probably a majority of its holdings.

Q. To whom? A. To Mr. Bercut.

Q. For what price?

A. Well, we were mainly talking about lump sums, I believe. I think we started out with \$50,000.00, or something like that.

Q. For how many shares?

A. Well, I believe we owned at that time about—what was it? 69,000?

Q. 78,000, wasn't it? (Indicating document.)

A. 78,000—oh, wait a minute. I beg your pardon, just a second. (Examining document.) Yes, 78,000 shares. That is both common and preferred.

Q. Well, how many shares did you propose to sell to Mr. Bercut?

A. Well, we proposed to sell a majority of our holdings; in other words, that we would have to step into a minority position.

Q. For what price?

A. Our first conversation was around \$50,000.00. We ended up—

Q. Never mind. Now, I am asking you the question, what did he say to you after you proposed it to him?

A. Well, he expressed interest. He was somewhat skeptical because of our condition first, but he—

Q. Whose condition? A. Merchants.

Q. Well, then, what did he say to you?

(Deposition of Lloyd R. Arnold.)

A. Well, I don't exactly know, but he said he wanted to look into it.

Q. All right. Did he look into it?

A. Yes, he did.

Q. Then what happened next?

A. Well, there was a lapse in our negotiations, probably twenty or thirty days.

Q. Then what happened?

A. During which time our condition did not improve.

Q. Then what happened?

A. Then we resumed our negotiations again.

Q. All right. A. And——

Q. What did you say to him and what did he say to you?

A. Well, he expressed the fact—while we were negotiating, why, he naturally had found out about certain losses that were there, and we also had another loss that was somewhat publicized in the papers, or a threatened loss, and he became somewhat hesitant upon working out the deal.

Q. What did he say to you?

A. However—well, on one occasion I have to admit he said that he didn't know whether he wanted to go through with it or not.

Q. All right. Then what happened?

A. There was another little lapse, and then we resumed again, and we were able to come to an understanding.

Q. What was that understanding?

(Deposition of Lloyd R. Arnold.)

A. It resulted in the deal that was made.

Q. What was that understanding?

A. The understanding was—the final understanding was that the best he would pay was \$35,000.00.

Q. For what? A. For all of our stock.

Q. Payable how? Payable how?

A. Payable in cash to the holding company, and we in turn to apply twenty-five thousand on our obligation to the Merchants.

Q. All right.

A. I think we were given an option, too.

Q. Now, when that understanding was reached, who reached the understanding? Whose minds met on that understanding?

A. Mr. Bercut and myself.

Q. Then what did you do?

A. Then we went to the Pacific National Bank.

Q. Now, wait a minute. Did you draft some form of agreement on it?

A. I drafted—this is my own dictation; I drafted this agreement here (indicating)—the original of this. This is a copy.

Q. What did you do? Dictate it to your secretary?

Mr. Goodman: Excuse me just a moment. But has that letter been identified?

Mr. Scampini: I am going to.

Mr. Goodman: I think you had better identify it.

(Deposition of Lloyd R. Arnold.)

A. I drafted this document.

Mr. Scampini: All right. Will you mark this as the next exhibit for purposes of identification?

(Said letter marked "Plaintiffs' Exhibit 3 for identification.")

Mr. Goodman: Leave this off the record.

(Discussion.)

Mr. Goodman: It has no signatures on it.

Mr. Scampini: All right. The original is supposed to be in the hands of Mr. Peter Bercut. I will have to find out——

A. I drafted this; I am sure I did.

Q. Then what happened when you drafted that? What did you do?

A. Delivered the original to Mr. Bercut.

Q. Did you sign it?

A. Yes, Mr. Maffei signed it.

Q. Did you ask Mr. Maffei to sign it?

A. He signed it.

Q. Did you call any meeting of the Board of Directors to approve the transaction? A. No.

Q. Did you ever suggest or did Mr. Bercut ever suggest a meeting of the Board of Directors to pass upon the transaction?

A. I don't believe so. I don't recall.

Q. Did you ever call any meeting of the executive committee to pass upon the transaction?

A. No, I didn't call a formal meeting.

Q. Who were the executive committee at that time?

A. The executive committee was Mr. Maffei,

(Deposition of Lloyd R. Arnold.)

Mr. Bercut, and myself.

Q. And after this letter agreement was drafted by you and signed by you, what did you do with it? What did you do with it?

A. I delivered the original to Mr. Bercut.

Q. Did Mr. Bercut sign underneath where it says "Accepted"? A. Yes, I believe he did.

Q. And did he take possession of the stock at that time?

A. We went to the Pacific National Bank—I believe we went down there together, and by paying the bank what we owed them—not what we owed them; I mean delinquent trust charges and interest, and they wanted a \$5,000.00 payment on the principal to release the stock. That was the main block, of course, of the Pacific National.

Q. Wasn't that stock that was referred to in that agreement on pledge at the time to Pacific Empire Corporation? A. Yes, most of it was.

Q. Did Pacific Empire Corporation receive anything from the transaction?

A. Well, they were to receive the cash, but it was immediately re-loaned to the holding company, of course.

Q. Did the Pacific Empire Corporation make this deal, or did Pacific Empire Holdings make the deal?

A. No, Pacific Empire Holdings made the deal.

Q. And what consideration did the Pacific Empire Corporation receive out of the transaction?

(Deposition of Lloyd R. Arnold.)

A. Well, the procedure was that we—I mean the bookkeeping end of it——

Q. Tell me what you did with the consideration.

A. Wait a minute. You have got me confused here now.

Q. Well, I don't want you to be confused. I don't want to confuse you.

A. I don't mean it that way. This was sold by the Pacific Empire Holdings Company. It owned the stock, naturally; it was pledged. The holding company got the cash.

Q. Yes. What did you do with the cash.

A. Put twenty-five thousand in a special account for the Merchants.

Q. Whose money was that that you paid to the Merchants? Who paid the money to the Merchants?

A. The holding company, I believe.

Q. How much did you pay to the Merchants?

A. Twenty-five thousand.

Q. You had \$10,000.00 left. What did you do with that \$10,000.00? What did the holding company do with the \$10,000.00?

A. Well, five thousand went for principal.

Q. On what?

A. On the bank loan with the Pacific.

Q. Whose loan?

A. I believe the holding company loans—there were two loans there at the time; and that is why I am hesitating.

Q. And the balance went for what?

(Deposition of Lloyd R. Arnold.)

A. The balance went for delinquent interest and trust charges. I think the whole thing amounted to about \$8,000.00 or more at the time we got through.

Q. Didn't you pay some of this to Kohler & Chase for rent, from the \$10,000.00?

A. Yes, they got some of it.

Q. Whose obligation was that?

A. Holdings'.

Q. Now, I want to know what did Pacific Empire Corporation receive from the proceeds of this transaction?

A. Well, they didn't receive anything, I guess.

Q. Now, at that time you were director of Pacific Empire Corporation, weren't you?

A. Yes.

Q. Mr. Maffei was president, wasn't he?

A. Yes.

Q. Mr. Bercut was a director, wasn't he?

A. Yes.

Q. You all knew—that is, you knew about this pledge of the Merchants Ice stock to Pacific Empire Corporation, didn't you? A. Yes.

Q. All right. Did you call any meeting of the Board of Directors of Pacific Empire Corp. and release the pledge of Pacific Empire Corp. on this stock?

A. No, I didn't. I wasn't secretary of that company, you know.

Q. Well, do you know whether or not any such meeting was held?

(Deposition of Lloyd R. Arnold.)

A. Not within my knowledge.

Q. No, did you ever participate in any such meeting? A. No.

Q. Do you know whether or not a release of the pledge was ever obtained from Pacific Empire Corporation for this transaction?

A. Not that I know of.

Q. No. Now, subsequent to the transaction, to the signing of this agreement, did you deliver the shares to Mr. Peter Bercut referred to therein?

A. Yes.

Q. And how many shares were delivered to Mr. Peter Bercut?

A. Well, everything I believe that is in that letter.

Q. Read it.

A. The total holdings were 78,358 shares. That is correct.

Q. Were those all of the shares owned by the holding company of Merchants Ice & Cold Storage Company? A. That figure there is all, yes.

Q. And after that stock was delivered to Mr. Bercut, what did the holding company own thereafter by way of assets?

A. Well, we still had our stock in the Pacific Empire Corporation.

Q. Well, where was that stock?

A. That was in our—it was in our safe at that time.

Q. All right. And what did Pacific Empire Cor-

(Deposition of Lloyd R. Arnold.)

poration own at the time? What were the assets of Pacific Empire Corporation?

A. The assets were stock of Pacific National Bank and the obligation of the holding company.

Q. And how much did the holding company owe the Pacific Empire Corporation approximately?

A. I believe around a hundred and fifty thousand—somewhere around there.

Q. And did you have anything else in the holding company besides this stock of the Pacific Empire Corporation?

A. We had our interest in the laundry.

Q. And how much was that?

A. Well, $47\frac{1}{2}\%$ interest at that time.

Q. What had you done with that $47\frac{1}{2}\%$ interest?

A. Well, it wasn't in our safe; it was pledged.

Q. Pledged to whom?

A. Kern County Bank at Bakersfield.

Q. Did you have any other assets that you know of? A. Yes, we had odds and ends.

Q. Worth approximately how much?

A. Well, not very much.

Q. How much were the aggregate liabilities of the holding company after this transaction was consummated?

A. Well, whatever was still owing to the Merchants; I guess another twenty or twenty-five thousand. We owed our landlord, George Chase, at that time probably eleven thousand or so.

(Deposition of Lloyd R. Arnold.)

Q. Who else?

A. Oh—yes, we owed our attorneys that were handling the litigation with the Government.

Q. Who were they?

A. Howard Ellis and Conrad Hubner.

Q. How much?

A. I believe they had—I guess they had just about earned their fee up there—somewhere around twelve or thirteen thousand.

Q. Who else did the holding company owe?

A. Well, at that time we owed another attorney down here, Eddie Molkenbuhr. In fact, we owe some to Mr. Scampini too?

Q. Did you owe the Corporation Trust Company?

A. Yes, we owed the Corporation Trust Company.

Q. Approximately how much?

A. Oh, we must have owed them probably a couple of thousand dollars.

Q. Did you owe to the liquidating agent of the City National Bank approximately \$70,000.00?

A. Yes, with principal and interest, yes, it must be around that.

Q. Did you owe Pacific Empire Corp. approximately \$150,000? A. Yes.

Q. Well, now, after this transaction was consummated what did the holding company have with which it could discharge these obligations?

A. It only had its stock in the Empire Corpo-

(Deposition of Lloyd R. Arnold.)

ration and its 47½% interest in the laundry company at Bakersfield.

Q. That had already been pledged? Is that right? A. That is right.

Q. Now, subsequent to this transaction did Mr. Peter Bercut—strike that out. Subsequent to the transaction, did the change in the management of the Merchants Ice & Cold Storage Company take place, to your knowledge?

A. You said subsequent to this transaction?

Q. Yes. A. Yes, it did.

Q. What happened?

A. Well, I believe that the new management represented by the purchasers—by the purchaser—I believe they took possession sometime—I believe it was February 1st, the following month.

Q. Did you resign as an officer and director of the Merchants Ice & Cold Storage Company?

A. Yes, we called a meeting, or else it may have been the next regular meeting, and I resigned, yes.

Q. And did Mr. Maffei resign as an officer or director? A. Yes.

Q. Did Mr. Peter Bercut and his nominees take over the management of Merchants Ice & Cold Storage Company? A. Yes, they did.

Q. Now, at the time on or about January 1st, 1941, was the Merchants Ice & Cold Storage Company making money from its operations or losing money?

(Deposition of Lloyd R. Arnold.)

Mr. Goodman: Are you referring to January 1st, 1941 or 1942?

Mr. Scampini: 1941.

A. It was losing money.

Q. It was losing money from its operations?

A. Yes.

Q. Are you sure it was losing money from its operations? A. Yes—wait a minute, now.

Q. That is just what I want—I want you to be sure.

A. Well, I mean they lost money from it—let's see, now——

Q. Did it show at the end of the year any net profits, or what? A. Well——

Q. Well, never mind. We will prove it. Withdraw the question. A. I could answer that.

Q. We will prove it from the books of the company. I now want to show you, Mr. Arnold, a letter addressed to Pacific Empire Holdings, Inc., and I will ask you to look at that document and see if you recognize it? (Showing letter to the witness.)

A. Yes, I recognize it.

Q. Whose signature is that at the bottom?

A. Mr. Bercut.

Q. When did you receive that document from Mr. Peter Bercut?

A. I don't know—I would say on or about the time of the conclusion of the negotiations.

Q. Which negotiations?

A. Having to do with the sale.

(Deposition of Lloyd R. Arnold.)

Mr. Scampini: Mark this as plaintiffs' exhibit next in order.

(Said letter marked "Plaintiffs' Exhibit 4 for identification.")

Q. Do you recall the conversation with Mr. Bercut with respect to this document which is now Exhibit 4, purporting to be a letter of resignation signed by Peter Bercut, addressed to Pacific Empire Holdings, Inc., under date of March 31, 1940?

A. I don't know as I recall the conversations.

Q. Just substantially, give us the best of your recollection.

A. Well, I believe it was just merely brought up for discussion, whether or not he should resign as director.

Q. And who brought it up?

A. I presume Mr. Bercut did.

Q. Well, do you recall whether he did or did not?

A. He would have brought it up, probably.

Q. Well, do you recall whether he did or did not bring it up? Do you recall?

A. He brought it up.

Q. And do you recall where this document was dictated by Mr. Peter Bercut, or at what time? Was it handed to you, or what?

A. That was dictated up in our office there, yes.

Q. Do you recall approximately when it was dictated in your office by Mr. Peter Bercut?

A. Well, as I said, on or about the time when we were concluding the negotiations, yes.

(Deposition of Lloyd R. Arnold.)

Q. When was this resignation of Mr. Peter Bercut accepted by the Board of Directors, if you know, Mr. Arnold?

A. It has never been accepted, that I know of, by a formal Board meeting, no.

Q. Now, did you hold a meeting in just the last couple of weeks? A. No—well——

Q. I will ask you to take a look at the minutes.

A. (Examining minute book.) This is this last one—no—no, there was no action taken on that.

Q. Well, will you please read the minutes and see whether or not—just a second. State what you did with that resignation at that meeting?

A. The resignation wasn't brought up here, no.

Mr. Goodman: What is the date of those minutes?

A. This is August 20th, 1942.

Mr. Scampini: Q. You say it wasn't brought up, Mr. Arnold. Will you read the minutes and see if they refresh your memory.

A. Yes, that is right. It was brought up at this meeting. I had forgotten about it.

Q. All right. Now, did you ever hold any directors' meeting in between the period of time intervening from on or about January 8th, 1941, and the meeting held August 20th, 1942?

A. No, I don't believe there was a Board meeting.

Q. Was there ever any executive committee meeting?

(Deposition of Lloyd R. Arnold.)

A. I will have to look and see here (examining minutes). Your question was what?

Q. Since January 8th, 1941, up to August 20th, or thereabouts, of 1942, were there ever any intervening meetings? A. '41 and '42—no.

Q. So that the first meeting of the Board since January 8th, 1941, was the one held August 20th, 1942? Is that right?

A. Yes, this last meeting, yes.

Q. All right. Now, was there any stockholders' meeting held in 1942?

A. No, that is the meeting. We couldn't get a quorum again.

Q. Now, at the meeting held August 20th, 1942, did you submit to the Board for its confirmation, approval or disapproval the transaction wherein and whereby Peter Bercut acquired this block of Merchants Ice & Cold Storage Company stock?

A. Let me refresh my mind from these minutes here. There are two or three there—may I look at that again?

Mr. Goodman: Just a second (examining minute book).

A. What date was that again?

Mr. Scampini: Q. This last meeting.

A. The first meeting?

Q. That was the first meeting held, you testified—— A. Yes.

Q. (Continuing:)—since the transaction with Mr. Peter Bercut? A. Yes, sir.

(Deposition of Lloyd R. Arnold.)

Q. Did you submit to the Board for its approval or disapproval or confirmation or ratification the transaction had between you and Mr. Peter Bercut?

A. Nothing, no.

Q. The answer is you did not?

A. I have already answered that.

Q. All right.

A. I haven't submitted that to any Board for approval.

Q. All right. Now, you are familiar with the powers of the officers and directors which are found in the minute books or in the by-laws, aren't you, Mr. Arnold? You read those?

A. Yes, I am familiar.

Q. Did you read the section dealing with the executive committee and its powers?

A. Yes, I am familiar with it.

Q. I will ask you to look at page 30 of Volume I of the minute books, which deals with the by-laws of the corporation, entitled, "Powers of the Executive Committee." Will you please read that, and then state whether or not you submitted the transaction to the Board of Directors for its approval or disapproval or ratification or confirmation?

A. No, I did not.

Mr. Brownstone: May I see that, please?

(Examining minute book.)

Mr. Scampini: Q. Now, will you please state whether the subdivision entitled "Powers of the Executive Committee" was in full force and effect

(Deposition of Lloyd R. Arnold.)

on January 8th, 1941, and in full force and effect on August 20th, 1942? A. Yes, it was.

Mr. Scampini: No further questions.

Mr. Goodman: I will have quite a little cross-examination.

(Discussion off record.)

Mr. Scampini: Let the deposition be regularly adjourned until Saturday, September 19th, at the hour of 9:30 o'clock A. M., and the witness will return for further testimony.

(Thereupon an adjournment was taken until Saturday, September 19th, 1942, at 9:30 o'clock A. M., and by consent of counsel to be resumed at the same place.)

Room 816, No. 300 Montgomery Street,
San Francisco, California,

Saturday, September 19, 1942, 9:30 A. M.

(Pursuant to the foregoing adjournment the deposition of the witness,

LLOYD R. ARNOLD,

at the above time and place was resumed, there being the same appearances as hereinbefore noted.)

LLOYD R. ARNOLD,

recalled as a witness, having been previously sworn by the Notary Public to tell the truth, the whole

(Deposition of Lloyd R. Arnold.)

truth, and nothing but the truth, testified as follows:

Direct Examination

(Resumed)

Mr. Scampini: I want to ask a few more questions before closing, if I may.

Mr. Goodman: You say you want to ask a few more questions?

Mr. Scampini: Yes, if I may.

Mr. Goodman: Yes, certainly.

Mr. Scampini: Q. Mr. Arnold, approximately what month of 1940 was it that you first approached Mr. Peter Bercut on the proposed transaction?

A. Well, I would think—let's see—the deal was closed on the 8th of January. I would think sometime in November. If I refresh my memory on that, I could probably give that closer.

Q. Would you say approximately three months before it was finally concluded?

A. I have always thought it was about sixty—somewhere between sixty and ninety days, probably.

Q. How often did you talk to him during that period of time concerning this proposed transaction?

A. Well, numerous times.

Q. At what price did you first propose to sell the shares or under what terms and conditions did you first submit a proposal to him?

A. Well, as far as the terms and conditions are concerned, it is somewhat vague, but I guess we

(Deposition of Lloyd R. Arnold.)

started out somewhere around \$75,000.00. Of course, that wasn't for an out-and-out sale.

Q. Now, did you approach him as a director of the company, Mr. Arnold?

Mr. Goodman: Well, I think that calls for the witness' conclusion and opinion.

Mr. Scampini: Strike that out, then.

Q. Why did you approach Mr. Peter Bercut?

A. Well, Mr. Bercut had been associated with us for years, and I considered——

Q. By "associated"—what do you mean by "associated"? A. In a business way.

Q. Well, explain what you mean by "associated with us." What do you mean?

A. Well, he had been appointed a director of the company, and he had been during the last year even closer by being on the Board of the Merchants and the bank. At that time our whole plan—or before these negotiations — was to endeavor to strengthen the organization by some one who had more resources than we had.

Q. By that do you mean that the holding company found itself in a position where it had to have some financial aid and assistance? Is that what you mean? A. Yes.

Q. Did you approach him for the purpose of obtaining that financial aid and assistance?

A. That was the purpose of it.

Q. And what did you propose to him, Mr. Arnold?

A. We proposed to him to enter into a—well,

(Deposition of Lloyd R. Arnold.)

more or less—what we were trying to work out was a split of the stock that we owned. We didn't feel sure that we could keep it in control, and probably would have to take a minority position. It was more or less to work it out; if it weren't a corporation, a partnership, with the idea of bringing in—

Q. A partnership between whom?

A. Between Mr. Bercut and the holding company for the purpose of bringing in some — in other words, we had the assets, but we didn't have the necessary cash to round out the program.

Q. Now, at that time what did you consider the reasonable value of that block of stock held by the holding company in the Merchants Ice & Cold Storage Company to be?

A. Well, even though we started out at \$75,000.00, it didn't necessarily mean the value of it. We placed a higher value on that—a going concern. However, the situation was such that we had to work out the association or partnership.

Q. And by "association"—by "the situation was such," do you mean that the financial condition of the holding company was such that you were under a sort of pressure to dispose, or—

A. We were under pressure from all sources. By "all sources" I mean—

Q. Now, when you first submitted the proposal to Mr. Peter Bercut, what was his reaction?

A. Well, I believe his first reaction was to look into the matter more thoroughly, and he stated he was interested.

(Deposition of Lloyd R. Arnold.)

Q. Did he say he was interested in his individual capacity, or what?

A. I assumed it was in an individual capacity. I don't know whether he stated that or not.

Q. Did he ever express his views to you as to what the company should get for the sale of a portion or the whole of this block of stock?

A. We stated what we wanted to do, and there was no——

Q. Now, when you say "we," what do you mean by "we"?

Mr. Goodman: Let him finish his answer.

Mr. Scampini: Q. When you say "we"——

A. Well, myself on behalf of the holding company.

Q. All right.

A. We stated the plan that we wanted to work out. At the beginning he didn't state any figure. It more or less ended up with the figure at which we sold.

Q. Now, you finally fixed the price of \$35,000.00 for all of this stock?

A. Well, I think we got down around fifty thousand, and Mr. Bercut went away, and I think Mr. Bercut stated that he couldn't pay that amount of money with the uncertainties existing.

Q. Then what happened?

A. Well, I went to the Pacific National Bank to find out what we could get the stock loose for, and after we got through talking about the whole deal,

(Deposition of Lloyd R. Arnold.)

our obligation to the Merchants and everything, why, we had to pay in \$25,000.00 to the Merchants.

Q. Yes, I know, but who finally said, "I'll pay you thirty-five thousand," or, "I'll sell for thirty-five thousand"? Who fixed the price at the end of the negotiations? How did the price come down from seventy-five to twenty-five? How did that happen?

A. When we got down near the last, why, Mr. Bercut stated he wouldn't pay any more.

Q. And what did you do when he told you that?

A. Well, we were very much upset about it—I recall that—because we wanted more.

Q. Now, did you——

A. And furthermore—in other words, we weren't working out the deal that we had attempted to at all. We were down to, instead of maintaining an interest in it as associates, why, we were selling all of our stock with the opportunity with an option to buy it back—buy a portion of it back.

Q. And when Mr. Bercut finally made that proposal to you, what did you say to him, if anything—the proposal of \$35,000? By that I mean the proposal of thirty-five thousand for all of it, with an option back to the company to buy a portion of it back? What did you say to him?

A. Well, I don't exactly know what I said, but I think I expressed myself, well, that we had to make the deal.

Q. What do you mean by "we had to make the deal"? Why did you have to make the deal?

(Deposition of Lloyd R. Arnold.)

A. Well, because of the general pressure and the conditions that I mentioned the other day here.

Q. By that you mean the holding company had to make the deal? Is that right? Or who had to make the deal? Whom do you mean by "we"?

A. When I say "we" I am speaking of the holding company. I had no personal interest—

Q. You mean you were acting on behalf of the holding company? Is that right?

A. Yes, that is right.

Q. But you had never discussed it with the board of directors? You were just assuming—you were acting on behalf of the holding company, and you were assuming that you were representing the holding company? Is that right?

A. Yes, that is right.

Q. You were trying to make the best possible deal that you thought you could make for the holding company? Is that right?

A. That is everything we were trying to do.

Q. And Mr. Peter Bercut was trying to make the best possible deal for himself? Is that right?

A. I presume that is correct.

Q. Well, he never offered at any time during the course of the negotiations to pay the price that you felt the holding company should receive, did he?

A. No, I think we hesitated a little bit around fifty thousand before he went away, but—

Q. But when he left you to go away, at which

(Deposition of Lloyd R. Arnold.)

time the price had already come down to fifty thousand, what was his last word to you?

A. You mean before he left us?

Q. Yes.

A. Well, he wanted to think it over.

Q. How long did he think it over?

A. Well, now I don't know how long, but I believe he wanted some sort of vacation at that time. It must have been——

Q. How long was he away?

A. Well, I don't know. It must have been a couple of weeks or so, I guess.

Q. And what happened after he came back? Did you contact him or did he contact you?

A. No, he contacted us.

Q. And what did he say to you?

A. I'm trying to recall whether—when he first came back, whether he just about turned the deal down or whether he was just hesitating on it and he turned it down later; I can't recall.

Q. Well, when he did turn the deal down, what deal did he turn down?

A. I think he turned down the deal that he didn't—he didn't want it.

Q. Well, what was that deal that he didn't want?

A. Well, he didn't want anything to do with buying any interest in the Merchants, or any part of it, for that matter.

Q. At what price?

(Deposition of Lloyd R. Arnold.)

A. I think before that we were talking about fifty thousand.

Q. All right.

A. Whether we were down to thirty-five thousand or not, we got down there on or about that time, I know.

Q. Well, when it got down to thirty-five thousand what did he say?

A. He was very positive one day that he didn't want it.

Q. Well, when was it that he didn't want it?

A. You mean the date or——

Q. Approximately when?

A. When he returned. I think probably right after the first of the year—right after New Year's.

Q. At what price was it that he didn't want it?

A. Thirty-five thousand, or any price.

Q. Or any price. Well, then, how did you finally make a deal with him? How did that come about?

A. I asked him to look into it further. In fact, I think I made arrangements for him to meet Mr. Gaither over here, because our backing wasn't in too good shape, and Mr. Gaither was interested in it. I don't mean Mr. Gaither personally. I mean the bank was interested.

Q. All right. Then what happened?

A. Well, Mr. Bercut then, after looking into it further and I believe talking to the bank, and I don't know, probably others——

Q. Others? Who?

(Deposition of Lloyd R. Arnold.)

A. Well, I don't know—his own associates; none that I knew.

Q. I see. A. That he decided to take in.

Q. For what price?

A. Thirty-five thousand.

Q. Well, now, when he decided to take it for thirty-five thousand, did you offer the same block of stock to anybody else on the open market or otherwise for the sum of \$35,000.00? A. No.

Q. Did you ask for a few days within which to see whether you could get a better price than \$35,000.00? A. No.

Q. Did you make any effort from any other source to obtain a better price than \$35,000.00?

A. You mean after Mr. Bercut had stated he would take it for thirty-five?

Q. Yes. A. No.

Q. Well, during the course of negotiations with Mr. Peter Bercut, did you try from any source whatsoever to get a better price than \$35,000.00?

A. At the beginning of conversations with Mr. Bercut there might have been an overlap. We were talking over here at the bank, one place in particular, for a better price, yes.

Q. Did you go back to that particular source to see if you could get a better price than \$35,000.00, after you had finally agreed with Mr. Bercut?

A. No.

Q. Did Mr. Peter Bercut ever ask that a directors' meeting be called to pass upon the transaction,

(Deposition of Lloyd R. Arnold.)

to determine the advisability of disposing of this block of stock?

A. I don't recall that he did.

Mr. Scampini: I want for the purpose of the record, while you are here, being that you are secretary—unless it can be stipulated that we identify these ledgers and have them marked. (Producing books.)

Q. Will you take a look at those books and tell us whether or not they are——

A. Yes, those are the company books——

Q. Who kept those books?

A. Mr. Heer kept them.

Q. Mr. Heer kept them? A. Yes.

Mr. Goodman: You can offer them for identification.

Mr. Scampini: Q. Did you work on them yourself? A. No.

Q. Mr. Heer worked on them? A. Yes.

Q. Did he work on them under your supervision?

A. Well, yes, I guess he did.

Mr. Scampini: For the purpose of identification I ask that you mark as the exhibit next in order the book entitled "Current Records of Pacific Empire Holdings" as "A", the general ledger as "B", and the journal as "C".

(Said books marked "Plaintiffs' Exhibits 5-A, 5-B and 5-C for identification.")

Q. Now, you are familiar with the provision in the by-laws of the corporation, Mr. Arnold, concerning the powers of the executive committee?

(Deposition of Lloyd R. Arnold.)

A. Yes.

Q. Which you examined the other day?

A. Yes.

Q. And the board of directors? A. Yes.

Q. In which it stated that the executive committee has all the powers of the Board, subject to the right of the Board to disaffirm the action? Do you remember that? A. Yes.

Q. Did you ever bring up to the Board of the Pacific Empire Holdings the transaction wherein or whereby you and Mr. Maffei and Mr. Peter Bercut together worked out this transaction?

A. No.

Q. Was the board of directors of the Pacific Empire Holdings ever given an opportunity to affirm or disaffirm the transaction?

Mr. Goodman: Well, now, I think that calls for the opinion and conclusion of the witness, and I will object to it.

Mr. Scampini: Answer the question, and the Court can rule upon it.

A. No.

Mr. Scampini: No further questions.

Mr. Goodman: Is that all?

Mr. Scampini: Well, I will go farther, so as to cure Mr. Goodman's point.

Q. Was any meeting of the board of directors of Pacific Empire Holdings, Inc. ever held after the transaction with Mr. Peter Bercut was entered into, for the purpose of acting upon or taking action upon the transaction, to your knowledge?

(Deposition of Lloyd R. Arnold.)

A. Was a meeting held for that purpose?

Q. Yes. A. No.

Mr. Scampini: No further questions.

Cross Examination

Mr. Goodman: Q. Mr. Arnold, at the time of this transaction with Mr. Bercut, you were an officer of the Merchants Ice & Cold Storage Company?

A. Yes, I was.

Q. You were the president?

A. The president.

Q. And how long prior to the transaction with Mr. Bercut in January of 1941 had you been the president of the Merchants Ice?

A. I believe I was finishing up my second year.

Q. Prior to the time that you were president of the Merchants Ice, were you a director?

A. Yes.

Q. And how long were you a director prior to the time that you became president?

A. I think two or three years.

Q. Now, at the time of the transaction with Mr. Bercut in January of 1941, there were seven directors of the Pacific Empire Holdings Company, were there not? A. Seven is correct, yes.

Q. Yourself, Mr. Bercut, Mr. Maffei, the president—— A. Yes.

Q. Mr. Richards—— A. Yes.

Q. Mr. Heer—— A. Yes.

Q. Mr. Ryerson—— A. Ryerson.

Q. And Mr.—— A. Giachino, I believe.

(Deposition of Lloyd R. Arnold.)

Q. Giachino? A. Giachino.

Q. Now, who was Mr. Ryerson?

A. Mr. Ryerson was the president of the California Pacific Service Company, a laundry company—a laundry operating company.

Q. And who was Mr. Giachino?

A. I don't know just what he does do. He is a little rancher, I believe, across the bay in Alameda.

Q. Mr. Richards at that time was connected with a frosted food company, wasn't he?

A. Yes, he was at that time.

Q. What was Mr. Maffei's business at that time?

A. Well, Mr. Maffei's business at that time was president of the Pacific Empire Holdings.

Q. Aside from that did he have any occupation or business or calling? A. I don't believe so.

Q. None at all?

A. You mean other than his connection with the Holdings Company?

Q. Yes. A. Not at that time.

Q. The Pacific Empire Holdings Company was, as its name implies, a holding company?

A. That is correct.

Q. You didn't have to conduct any business in the Pacific Empire Holdings Company except to watch out for these important investments that the Pacific Empire Holdings Company had?

A. Well, it wasn't an operating company, if that is what you mean.

Q. And the sole business of that company was to

(Deposition of Lloyd R. Arnold.)

safeguard and watch out for and take care of the investments that that company had? Isn't that right?

A. Yes, supervise its operating companies.

Q. And were you the man who was in the nature of manager of the affairs during that period of time?

Mr. Scampini: I will object to that as asking for the conclusion of the witness. The minutes and by-laws will speak for themselves. There is a conclusion of law there. He was vice-president and secretary, as far as I can observe, and that is about as far as you can go in that respect, Mr. Goodman.

A. Do you want me to answer that?

Mr. Goodman: Q. Yes, if you will.

A. In my capacity, I believe that I was, yes.

Mr. Scampini: I move to strike the answer as not responsive to the question and being a pure conclusion of the witness.

Mr. Goodman: Q. It is a fact, is it not, Mr. Arnold, that you did actually manage what affairs there were of the Pacific Holding Company?

Mr. Scampini: I object to the question as asking for the conclusion of the witness and as asking for something which is trying to prove agency or power in a manner not consistent with the statute in that respect, and that he isn't competent to testify to his own powers, and that the records of the corporation will express the extent of his powers

(Deposition of Lloyd R. Arnold.)

Mr. Goodman: Q. Will you answer the question?

A. Well, I do want to say this right there, that I more or less managed the affairs. It was all under the complete—under the supervision of Mr. Maffei; I mean everything that was done, he knew about.

Q. Now, prior to that time what was the business of Mr. Maffei?

A. You mean prior to the——

Q. Prior to the date of this transaction with Mr. Bercut?

A. Well, you are going a long ways back. I met Mr. Maffei when I was hired by Mr. Stratton. That was away back in '29.

Q. What was Mr. Maffei's business at that time?

A. I don't believe I can tell you exactly what it was. I know what some of his business was before he was with the company, but as to what it was when he came with the company I am frank to say I don't know.

Q. You yourself had been a bank clerk, had you not?

A. I started out that way, yes.

Q. And you had some knowledge of financial affairs?

Mr. Scampini: Well, that is asking for the conclusion of the witness, too.

Mr. Goodman: Q. That is right, isn't it?

(Deposition of Lloyd R. Arnold.)

A. Well, I presumed I did. It isn't very evident, I guess.

Q. And it is a fact, is it not, that you did, subject to consultation with Mr. Maffei, actually conduct what business affairs there were of the Pacific Empire Holdings?

Mr. Scampini: I object to that question as an attempt to prove agency and power in a manner not consistent with the statute and——

Mr. Goodman: I am not asking for any of his powers. I am asking what he did.

A. I didn't conduct all of those things, no. In the Holdings Company Mr. Maffei and I—there were certain things that he was qualified to do and did, and certain things that I was more qualified to handle, and I would handle them.

Q. What were the things that Mr. Maffei was qualified to do, the best of your recollection?

A. Well, in things directly affecting the holding company.

Q. What, for example?

A. Well, for instance, our backing, through the Pacific Empire Corporation—he was active with the bank as our representative; he spent a lot of time around the Merchants there before I was president and while I was.

Q. Now, during the year prior to the transaction with Mr. Bercut in January, 1941, it is a fact, is it not, that the financial condition of both the Merchants Ice and the Pacific Holdings Company was becoming acute? That is true, isn't it?

(Deposition of Lloyd R. Arnold.)

A. Yes, that is correct.

Q. The Merchants Ice was having increasing difficulties in paying its debts and meeting its payroll during that period of time? A. It was.

Q. It is also a fact, is it not, that during that same period of time—that is, the year prior to the transaction with Mr. Bercut—the bonds of the Merchants Ice were selling at a very low price?

Mr. Scampini: Now, that is an incompetent, irrelevant and immaterial question, and I object to that question.

A. I don't know as they were lower than they had been after we had taken over the Merchants; they were down as low as thirty-five when we first went in there.

Mr. Goodman: Q. Well, during the period of, say, the year preceding the transaction with Mr. Bercut the bonds on the market were down lower than \$60.00 a share, weren't they?

Mr. Scampini: Well, I object to that on the ground they will speak for themselves, and you are asking for the conclusion of the witness.

Mr. Goodman: Well, the witness knows.

Mr. Scampini: Well, they will speak for themselves.

A. Well, I didn't pay a lot of attention to the bonds, because we couldn't buy any. What price did you say?

Mr. Goodman: Q. Lower than \$60.00 a share.

Mr. Scampini: What do you mean by "\$60.00 a share"?

(Deposition of Lloyd R. Arnold.)

Mr. Goodman: \$60.00 a bond.

A. A bond, yes.

Mr. Scampini: \$60.00 on the hundred?

Mr. Goodman: Yes, \$60.00 on the hundred.

A. I didn't think they were that low. I thought they were around seventy, but maybe they were around there.

Q. During the same period of time the Crocker Bank had made demands on the Merchants Ice to cure some violations of a trust agreement, had it not? A. Yes, it had.

Q. There was difficulty in getting money to buy shares in the Merchants Ice during that period of time? A. Yes, there was.

Q. Were there any objections made by the directors of the Merchants—during that period of time were there any objections made by the directors of the Merchants Ice to the management of the Merchants Ice? A. Yes, there was.

Q. Were there any requests made in the meetings of the directors of the Merchants Ice to change the management of the Merchants Ice?

A. Was there any request?

Q. Made during the meetings of the directors of the Merchants Ice to make a change of management of the Merchants Ice?

A. Not any formal request. There was one director made that statement, yes. In fact, he——

Mr. Scampini: "Made that statement." You mean "made that suggestion"?

(Deposition of Lloyd R. Arnold.)

A. Suggestion, yes.

Mr. Goodman: Q. And was it suggested by any of the directors at the meetings of the directors of the Merchants Ice that Mr. Bercut assume some active position in the Merchants Ice?

A. Yes, that statement was made.

Q. And at the time of this transaction it was—strike that out. Prior to the transaction with Mr. Bercut you were seeking to find some way to get the Merchants and the Empire Holdings Company out of their difficulties, weren't you?

A. Yes, I was.

Q. And you were seeking to interest other capital or a competent association to work out those difficulties, weren't you? A. I was.

Q. At that time did you consider that Mr. Bercut was a business man of capacity?

A. I did.

Q. And that was also the opinion of Mr. Maffei, was it not? A. Yes, it was, I believe.

Mr. Scampini: Mr. Maffei will speak for himself. We can also stipulate to that fact, Mr. Goodman.

Mr. Goodman: Q. And it was also your opinion and Mr. Maffei's opinion that—

Mr. Scampini: Just a moment, now. I raised the objection that you cannot prove by this witness what Mr. Maffei's opinion was. I will stipulate that Mr. Bercut was a man of business capacity.

Mr. Goodman: Now, Mr. Scampini, I am not

(Deposition of Lloyd R. Arnold.)

interested in what stipulations you are willing to make. This is the cross examination of this witness as to the circumstances under which this transaction was entered into, and it is proper cross examination in every respect.

Mr. Scampini: But I raised the objection then as to proving by this witness what Mr. Maffei's opinion was with respect to any matters, as asking for the conclusion of the witness.

Mr. Goodman: He knows what Mr. Maffei's opinion was. If he doesn't know, he can so state.

Q. Now, was it or not your opinion and Mr. Maffei's opinion that Mr. Bercut was the type of man that would bring considerable standing as well as financial assistance to the operations of both the holding company and the ice company?

A. I knew that such an association would certainly bring in lots more than we had.

Mr. Scampini: I move to strike out the answer as not responsive to the question.

Mr. Goodman: Will you read the question again, Mr. Reporter?

(Pending question read.)

A. I knew that it would bring credit and standing to the company, more than we had, yes.

Q. And from your discussions with Mr. Maffei, you knew that Mr. Maffei was of the same opinion, did you not?

(Deposition of Lloyd R. Arnold.)

A. We weren't in any disagreement that I knew of.

Q. Now, I wish you would answer that question.

A. Well, yes.

Q. This transaction with Mr. Bercut was initiated by yourself, was it not? A. Yes.

Q. And because of the necessities of both companies—that is, the Merchants and the holding company—you were seeking to get financial help and additional leadership? That is correct, is it?

A. That is right.

Q. And when you first took up the transaction with Mr. Bercut, it is a fact, is it not, that he was reluctant to go into the deal?

A. At first he merely expressed interest—that is all.

Q. And isn't it a fact that he also told you at the time that he had many other business interests and was not anxious to increase his responsibility?

A. I believe he mentioned that at one time, yes.

Q. Did Mr. Bercut at any time bring any pressure to bear upon you or urge you to make the transaction?

Mr. Scampini: I object to that as asking for the conclusion of the witness.

A. I couldn't term it "pressure," no.

Mr. Goodman: Q. Well, did he ever urge you to make the transaction?

A. Not in that sense of the word, no.

(Deposition of Lloyd R. Arnold.)

Q. Did you ever consider that you were making any improper transaction with Mr. Bercut?

A. It would not be improper. That is not the word.

Q. As a matter of fact, you considered that you were making as good a deal as, under the circumstances, you could make for the Empire?

A. It was very necessary that I work out something that would be beneficial or that would at least solve some problems that existed then for both companies.

Q. And you considered then that you were acting in a perfectly fair and proper way, did you not?

A. I was trying to work out the best deal I could.

Q. Didn't you consider that you were acting in a perfectly fair and proper manner in making this transaction?

Mr. Scampini: I will object to the question as entirely incompetent, irrelevant and immaterial.

A. I was acting properly, yes.

Mr. Scampini: That is asking for the conclusion of the witness, and I move to strike out the answer as being a mere conclusion.

Mr. Goodman: Q. Have you ever read or seen the complaint in this action?

A. I have never read it really through, but I saw part of it, yes.

Q. And when did you see the complaint, Mr. Arnold?

(Deposition of Lloyd R. Arnold.)

A. Well, I think it was about, maybe a week ago, I guess.

Q. Is that the only time you have ever seen it?

A. I believe it was.

Q. And where did you see the complaint?

A. I saw it here.

Q. In Mr. Scampini's office?

A. In this office, yes.

Q. Where did you say, Mr. Arnold?

A. In this office—I mean in this building—in these offices, I meant to say.

Q. Yes. And you came into Mr. Scampini's office and there read the complaint about a week ago?

A. I didn't read it thoroughly, as I just said; I just glanced at it.

Q. You glanced at it; and that was the one and only time that you did glance at it?

A. Yes, I believe it was.

Q. And that was prior to the time that your deposition was arranged for?

A. Well, yes, I believe so.

Q. And up to that time you had not seen the complaint?

A. You mean up to the time of my deposition?

Q. Up to the time a week ago, when you glanced at it.

A. No.

Q. At the meeting of the directors on August 20th, 1942, were you present?

A. Yes.

Q. Who else was present?

(Deposition of Lloyd R. Arnold.)

A. Let's see—all but one, I believe, Mr. Giachino wasn't present.

Q. All the other directors were present?

A. That is right.

Q. Who called that meeting?

A. Well, I believe either Mr. Maffei or myself.

Q. Well, don't you know who called the meeting?

A. I believe we sent out notices, but a waiver was signed by everybody that signed the minutes.

Q. Who attended to that?

A. I attended to that.

Q. I beg your pardon?

A. I believe I attended to that.

Q. Did you prepare the waiver of notice of the meeting?

A. No, I didn't.

Q. Who prepared it?

A. Well, Mr. Scampini's office here, I believe.

Mr. Scampini: Mr. Scampini did.

Mr. Goodman: Q. And prior to the preparation of the waiver of notice of the meeting of August 20th, 1942, did you have any consultation with Mr. Scampini concerning the calling of that meeting?

A. Yes.

Q. Where was that held?

A. Right here, I believe.

Q. And at whose request was the meeting held at Mr. Scampini's office—the preliminary meeting pertaining to the waiver of notice of the meeting of August 20th?

A. At whose request?

(Deposition of Lloyd R. Arnold.)

Q. Yes.

Mr. Scampini: I object to all this line of examination as not being within the scope of the direct examination. If you want to know the facts, I will give them all to you, but I still object to it as not being within the scope of the direct examination.

A. Well, Mr. Maffei and I had an appointment here with Mr. Scampini.

Mr. Goodman: Q. And who arranged that appointment?

Mr. Scampini: That is incompetent, irrelevant and immaterial, and not within the scope of the direct examination, and I object to the question.

A. I am frank to say I don't exactly recall who did make the appointment.

Mr. Goodman: Q. Was Mr. Scampini at that time the attorney for the Pacific Empire Holdings?

A. No, he wasn't.

Q. Why did you come to his office?

Mr. Scampini: That is incompetent, irrelevant and immaterial and I object to the question as also not being within the scope of the direct examination.

A. I have already said that we had conversations before the meeting.

Mr. Goodman: Q. Who prepared the minutes of the meeting of August 20th, 1942?

A. They were prepared in this office.

Q. And were they prepared before or after the meeting of August 20th, 1942?

(No answer.)

(Deposition of Lloyd R. Arnold.)

Mr. Scampini: Answer the question, Mr. Arnold.

A. Oh, I thought that was still—I beg your pardon.

Mr. Scampini: I am not waiving my objection, but answer the question.

A. Well, they were prepared before, I believe.

Mr. Goodman: Q. Who is Rebecca Tanzer?

Mr. Scampini: I object to that as being incompetent, irrelevant and immaterial and not within the scope of the direct examination.

A. Without looking it up, I would assume that she was a stockholder.

Mr. Goodman: Q. You say she is a stockholder?

A. I say without looking it up, I assume she is.

Q. Do you know her? A. No, I don't.

Q. And who is Elizabeth Wilhelm?

A. I don't know the party.

Q. You don't know her at all?

A. I don't know her. It may be a stockholder; I assume it is a stockholder.

Q. Was there a man by the name of Welhelm at any time connected with the Pacific Empire Holdings Company? A. Wilhelm?

Q. Yes.

A. Not within my knowledge—not unless it was before I was there.

Q. Or with any of the associated companies—do you know? A. No, I don't know the party.

Q. You said Mr. Scampini was not attorney for the Pacific Empire Holdings Company at the time

(Deposition of Lloyd R. Arnold.)
of this meeting of August 20th, 1942?

A. I did, yes.

Q. How long previous to that had it been since he was the attorney for the Pacific Empire Holdings Company?

A. I believe Mr. Scampini resigned in 1936 or '37—somewhere along there. I would have to look it up.

Q. He had been attorney for the Pacific Empire Holdings?

A. Yes, he was the attorney for the Holdings.

Q. And he severed his connection several years ago—is that right?

A. Several years ago, yes.

Q. And from that time on he was not the attorney or one of the attorneys or counsel for Pacific Empire Holdings?

A. I am afraid you will have to ask that again. Some of these cars go by here, and I don't get what your questions are.

Mr. Goodman: I am sorry. Will you read the question, Mr. Reporter?

(Pending question read.)

A. No, he was not.

Q. Was he representing or was he attorney, to your knowledge, for the Pacific Empire Corporation?

A. No, he was not.

Q. He was Mr. Maffei's attorney, was he not?

A. You mean personal attorney?

Q. Yes.

A. Well, I am frank to say I don't know.

and L. R. Arnold, secretary-treasurer.

Q. You don't know. Was the complaint in this action—strike that out. Did you know anything about the filing of the equity proceeding in Delaware for the insolvency of this corporation prior to the meeting of August 20th, 1942?

A. Yes, I did.

Q. How long before?

A. Well, we were advised that action was being taken, I'd say about—I would say it was a month before—if I look at that letter I could tell you; I don't know the date of it; I would say about three or four weeks before, or a month before.

Q. When you say "we were advised," whom are you referring to?

A. The holding company and myself.

Q. And when you are referring to the holding company, are you referring to any other individual officer or director of the holding company, outside of yourself?

A. Mr. Maffei always.

Q. And how were you and Mr. Maffei informed concerning the pendency of that action?

A. Well, there was a letter that came from an attorney in Wilmington, Delaware, stating that he represented some stockholders, a group of stockholders who were making statements that they didn't care for the management of the company and that they wanted an accounting, and all that sort of thing.

Q. And was that the first time that you personally knew anything about the proceeding in Delaware?

A. Yes, it was.

(Deposition of Lloyd R. Arnold.)

Q. When you got the letter from the attorney?

A. Yes, it was.

Q. Had Mr. Maffei advised you concerning the matter at any time prior to the receipt of that letter from the attorney in Delaware?

A. No—undoubtedly no—no, he didn't; he wouldn't have known it.

Q. Well, however, whether he would or wouldn't have known it, did he at any time prior to the receipt of that letter tell you about any pending proceeding that might be initiated in Delaware?

A. No.

Q. You knew nothing about it prior to that time?

A. Not until I got that letter. The fact of the matter is that it arrived on the same date we got notice of another suit, and I thought it was one and the same thing.

Q. And prior to the receipt of that letter had you been advised by Mr Scampini of the pendency of any such proceeding?

A. I don't believe so, no.

Q. Did you make any inquiry after the receipt of that letter as to how or in what manner the equity proceeding in Delaware had been initiated?

Mr. Scampini: Now, Mr. Goodman, you know very well—I am not objecting to your getting all the facts you want, but it certainly is not within the scope of the direct examination, and I raise the objection that you are going away outside the subject of the direct examination. You can prove

(Deposition of Lloyd R. Arnold.)

anything you want in your own manner, but not in this manner.

Mr. Goodman: Q. Will you answer the question?

A. Well, it was a new proceeding to me, and I wanted to find out information about it. I am not versed in those things.

Q. Now, in the resolution that was adopted at the meeting of August 20th, 1942, did the corporation appoint any attorney to represent it in Delaware? A. Yes.

Q. And whom did it appoint?

A. It was the same name as the party that wrote that letter. We had to find out who it was, and we came to Mr. Scampini to find out.

Q. Well, why did you come to Mr. Scampini to find that out?

Mr. Scampini: What difference does it make to you, Mr. Goodman, why he came to Mr. Scampini in the first place? Clients come to you. Why did Mr. Peter Bercut come to you to handle this case? That is a silly kind of question, if you ask me. I object to it as not being a proper question in the first place, and certainly outside the scope of the direct examination.

A. We had no attorney at the time.

Mr. Goodman: Q. Well, was Mr. Scampini representing the company at the time of the meeting of August 20th, 1942? A. Yes, he was.

Q. And these minutes of the meeting of August

(Deposition of Lloyd R. Arnold.)

20th were prepared by him for the company, of course, then? A. Yes.

Q. Now, who suggested at the meeting of August 20th, 1942, the name of the attorney who was to represent the corporation in the Delaware proceeding?

Mr. Scampini: Mr. Scampini.

A. Well, I was about to say that we neither had the knowledge nor the ability to get anybody there, and we asked Mr. Scampini to do that. We came here to get help when we got that letter.

Mr. Goodman: Q. Did Mr. Scampini advise you in the meeting of August 20th, 1942, that he contemplated filing an action for the receiver in Delaware against Mr. Bercut?

A. Well, no, we mainly went—we came here to seek——

Q. You can answer that “Yes” or “No.” Did he advise you at the meeting of August 20th, 1942, that he intended to file an action on behalf of the receiver as against Mr. Bercut? A. Yes.

Q. And did he state that he intended to file that action?

A. After discussion it was stated that the action would be taken.

Q. And thereupon the resolution was adopted which is in the minutes of the meeting of August 20th, 1942? A. Yes, that is right.

Q. Authorizing the appointment of an attorney

(Deposition of Lloyd R. Arnold.)

for the corporation in the proceeding in Delaware to consent to the insolvency proceedings there?

A. That is right.

Q. So that the purpose of the meeting of August 20th, 1942, was, was it not, Mr. Arnold, that the corporation should take this proceeding—pass this resolution so that it could accomplish the insolvency proceeding in Delaware and the bringing of this action against Mr. Bereut by the receiver?

A. Well, yes, the whole thing was to restore its solvency, or to keep it solvent.

Q. And in that proceeding, at that meeting Mr. Scampini was acting as the attorney for the corporation, was he not—the Pacific Holdings Company?

A. At that meeting, yes.

Mr. Goodman: In connection with the testimony of this witness I ask for the production by counsel for the Pacific Holdings Company, Mr. Scampini, of his correspondence initiating the insolvency proceeding in Delaware, with any firm, corporation or attorney in Wilmington, Delaware.

Mr. Scampini: Well, you can ask for it when the court orders it to be produced.

Mr. Goodman: Do I understand counsel will not produce it at this time?

Mr. Scampini: You haven't demanded it. It is not within the scope of the direct examination. You have no right to do it. If the court orders it, it shall be produced.

Mr. Goodman: At this time I give notice that I

(Deposition of Lloyd R. Arnold.)

will, in connection with the proceedings of this deposition, move the court for the production of this correspondence to which I have referred.

Mr. Scampini: Yes.

Mr. Goodman: And that in the event that it is not produced, that I will move to suppress the deposition on the ground that the documents which have been requested have not been produced.

Mr. Scampini: Very well. Make your motion.

Mr. Goodman: Q. Now, why was it that the name of the attorney that was selected to represent the corporation and consent to the insolvency proceedings was not included in the resolution, if you recall?

A. The only thing that I could say, the only reason I could give, would be that we didn't know who the court—I presume the court would appoint——

Q. No, I am talking about the attorney to represent the Pacific Empire Holdings Company in the insolvency proceeding in Delaware.

A. Mr. Scampini being our attorney here, we had asked him to get an attorney for us there. I assumed we had to have one there.

Q. Now, there was no resolution proposed at that meeting authorizing the corporation to file a complaint against Mr. Bercut, was there?

A. I would have to refer to the minutes. I don't know whether there is a direct resolution there or not.

Q. Suppose you look at it and see whether or not—it isn't there; to assist you in answering the

(Deposition of Lloyd R. Arnold.)

question, it isn't there. I am asking you whether or not any such resolution was proposed, to your knowledge?

A. I am familiar with the whole subject, but I didn't know whether an actual resolution was adopted or not.

Mr. Scampini: The minutes speak for themselves, don't they, Mr. Goodman?

Mr. Goodman: I know that, but I am asking him whether or not, aside from what appears in the minutes, any resolution was proposed or adopted.

Mr. Scampini: That is incompetent, irrelevant and immaterial. Suit was filed, wasn't it? That is what you are here for. Or do we have to have a resolution authorizing the filing of a suit, but no resolution authorizing the sale of Merchants Ice to Mr. Peter Bercut? It is outside the scope of the direct examination. I further raise that objection.

A. There was no resolution adopted, apparently.

Mr. Goodman: Q. And, so far as you can recall, no such resolution was proposed at that meeting?

A. The subject we mentioned was undoubtedly discussed, but I don't believe it was put in any formal resolution.

Q. Now, at this meeting of August 20th, 1942, at which Mr. Scampini, the attorney for the Pacific Empire, was present, you had a discussion, did you not, concerning this transaction with Mr. Bercut in January, 1941?

A. All matters relating—not all, but I mean any-

(Deposition of Lloyd R. Arnold.)

thing that led up to its condition, was discussed.

Q. Well, at this meeting of the directors did you make statements of any kind concerning the facts in connection with the agreement of January, 1941, with Mr. Bercut? A. Oh, yes, surely.

Q. And did you at that directors' meeting make any different statements than you have made today so far, or yesterday—or on Thursday, rather, in your testimony here?

A. I don't see how they could be any different. I have tried to confine myself to the facts.

Q. Will you answer the question? Did you make any statements that were contrary to or different than the statements you have made to us here in the course of your deposition? A. No.

Q. Did Mr. Maffei take part in the discussion concerning the Bercut transaction in the meeting of August 20th, 1942?

A. He took part in the discussion of that subject and any others relating to the company, yes.

Q. And did Mr. Scampini enter into the discussion concerning the Bercut transaction in January, 1941? A. Yes.

Q. And did he discuss those matters with you as directors of the company—as the attorney for the company at that meeting?

A. At that meeting, yes.

Q. Now, this was the first stockholders' meeting that the Pacific Empire Holdings had held since the transaction of January, 1941, with Mr. Bercut, was it not? A. Yes.

(Deposition of Lloyd R. Arnold.)

Q. When you read the complaint in this action about ten days ago, as you have stated—I will strike that out. At the time of the transaction of January, 1941, with Mr. Bercut, were you acquainted with any of his brothers in a business way at all—Henry Bercut or Jean Bercut or—I guess those are all—those two? A. I had met——

Q. But you had had no business transactions or relations with them at all up to that time, had you?

A. Wait just a minute. I don't recall who——

Q. But whatever acquaintance you may have had with any of Mr. Bercut's brothers up to that time would have been purely a most casual one? Is that a fact?

A. It would be through Mr. Bercut—Mr. Peter Bercut.

Q. And it would have been purely a most casual one?

A. I had no business dealings with Mr. Bercut's brothers up to that time, no.

Q. You don't recall at this time, as a matter of fact, whether you had ever met them up to that time? Isn't that true?

A. I have a recollection of meeting one of Mr. Peter Bercut's brothers at one time. I don't know just who—I couldn't state which one, I don't believe.

Q. Well, the extent of that, I assume, was more or less casual? A. Yes, it was.

Q. And in passing—is that right?

(Deposition of Lloyd R. Arnold.)

A. An introduction, or something like that.

Q. Now, when you looked at this complaint in this action about ten days ago, do you recall reading the following allegation in paragraph VII of the complaint: "Plaintiffs allege that the defendants—" that means the Bercuts —"and each of them at said time entered into a conspiracy with each other to acquire for themselves, for a nominal consideration, the said 78,358 shares of the capital stock of Merchants Ice & Cold Storage Company through the use of the position, power and influence of said Peter Bercut with the management of Pacific Empire."

Do you recall saying that particular sentence in paragraph VII of the complaint?

A. I believe I saw it. As I said, I didn't read that thoroughly..

Q. Well, would you like to look at paragraph VII in there again? (Showing document to the witness.)

A. As I say, I read the whole thing.

Q. Yes. Now, at the meeting of August 20th, 1942—and of course I call your attention to the fact that that meeting was held long before this complaint was filed—was there any suggestion made by either you or Mr. Maffei that Mr. Bercut should be charged with conspiracy in obtaining stock of the—in entering into this transaction of January, 1941?

Mr. Scampini: The same objection which I have made to all this line of examination.

(Deposition of Lloyd R. Arnold.)

A. Well, there was a long discussion on the whole subject. Whether or not that term was used, I couldn't say.

Mr. Goodman: Q. Well, did either you or Mr. Maffei at that meeting directly say that, in your opinion, Mr. Bercut should be charged with conspiracy in the complaint to be filed by Mr. Scampini?

Mr. Scampini: I again renew my objection that it is incompetent, irrelevant and immaterial, and not within the scope of the direct examination, that it is an improper question, and has nothing to do with the issues of the case.

A. I don't believe that we used the word "conspiracy."

Mr. Goodman: Q. As a matter of fact that statement in the complaint—strike that out.

Mr. Scampini: As a matter of fact, for the purpose of the record, that statement in the complaint is the lawyer's opinion as to the situation, and was dictated by the attorney who drafted the complaint. That will appear in the record.

Mr. Goodman: Q. As a matter of fact, you knew at the time that you looked over this complaint about ten days ago that that statement in the complaint was not the truth, didn't you?

Mr. Scampini: I object to that as incompetent, irrelevant and immaterial. You are asking for the conclusion of the witness as to what constitutes conspiracy. It is a matter for the court to determine

(Deposition of Lloyd R. Arnold.)

from the facts. I object to any answer to that question or the propounding of the question.

A. Well, I don't know how to answer that.

Mr. Goodman: Q. Why don't you know how to answer that, Mr. Arnold?

A. Well, in other words, I could put it this way. Not being an attorney—I mean from a business standpoint, naturally any dealings that I had with Mr. Bercut, it wasn't as though we were trading on some deal with a stranger; he was in possession of all the facts of it.

Q. And you did not consider that Mr. Bercut was imposing upon you in any way, did you, at the time of this transaction?

Mr. Scampini: I still say that is incompetent, irrelevant and immaterial. The question is, did he impose upon the corporation—not upon Mr. Arnold.

Mr. Goodman: Q. Will you answer the question, Mr. Arnold?

A. I have answered it in other ways in my testimony. He wasn't imposing on me, if that is the word.

Q. And was Mr. Bercut, at the time of the transaction of January, 1942, exercising any power or influence over you or over Mr. Maffei as president of the company?

A. I don't know who would exert any power over me, or influence.

Q. And did Mr. Bercut at the time of this trans-

(Deposition of Lloyd R. Arnold.)

action exercise any power or influence over you in connection with this transaction?

A. Well, over me, no.

Q. Did he exercise any power or influence over Mr. Maffei, to your knowledge?

A. Not to my knowledge.

Q. During the period from about 1937, I will say, until January, 1941, did you actually ever hold any meetings of the executive committee?

A. Well, I held numerous meetings.

Q. I mean did you actually hold any formal meetings?

A. Those meetings were always held at either Mr. Maffei's office or mine.

Q. Who wrote up the minutes? A. I did.

Q. (Continuing.) Of the Executive Committee?

A. I did.

Q. Without intending any unpleasant or deleterious criticism, it is a fact, is it not, that aside from Mr. Bercut the other directors of the Pacific Holdings Company were in the nature of what is commonly known as dummy directors, were they not?

A. Well, now, wait a minute, wait a minute—

Mr. Scampini: I have an idea the answer to that is "Yes." Go ahead and answer the question.

A. Well, now, wait a minute.

Mr. Scampini: Or treated as such, anyhow.

Mr. Goodman: Q. That is about the truth, isn't it? Maybe Mr. Heer—we will leave him in, because he was an officer of the company; but the

(Deposition of Lloyd R. Arnold.)

other men were more or less dummy directors, were they not? A. I will answer it this way——

Q. Were they not—in the common sense of the word?

A. I will answer it this way: Are you classifying Mr. Bercut in your question?

Q. Well, you can leave him in or out, as you see fit.

A. I will answer that question this way: In the holding company or in any corporation I think, the management, the ones who are actually there, are certainly more active as directors. The men on that Board in their business capacity certainly weren't dummies.

Q. Well, so far as the affairs of the holding company were concerned, the management of the holding company conducted its affairs, didn't it, as is usually the case?

Mr. Scampini: What do you mean by "the management," Mr. Goodman?

Mr. Goodman: Q. I mean by that, Mr. Arnold, so you can see what I am getting at, that you and Mr. Maffei practically, for all practical purposes, managed the affairs, what affairs there were of this holding company? There isn't any question about that, is there?

A. Well, we managed them; and there were quite a lot of them during that period, too, incidentally.

Q. Yes. As a matter of fact, you more than Mr. Maffei, because——

(Deposition of Lloyd R. Arnold.)

Mr. Scampini: It is argumentative.

Mr. Goodman: Q. (Continuing:) —particularly you, because of the fact that you were all of that time a director and part of the time president of the Merchants Ice & Cold Storage Company?

A. That is correct.

Q. Which was a big holding of the Pacific Empire Holdings Company, and you were in direct management and conducted the affairs of this holding company? A. Yes, that is correct.

Q. There is no question about that?

A. No question.

Q. And so far as the holding of directors' meetings or executive committee meetings were concerned, for all practical purposes those were formalities, were they not?

A. Well, I don't know that——

Mr. Scampini: The question is an argumentative question. I object to it.

Mr. Goodman: Well, the witness knows that.

Mr. Scampini: Well, the minute books will speak for themselves as to what the directors did. It is asking for the conclusion of the witness.

A. Every board of directors' meeting was properly called and regularly convened, and we always met in our directors' room.

Mr. Goodman: Q. Well, as a matter of fact you didn't complete the formalities on dozens of your directors' meetings? Isn't that right?

Mr. Scampini: That is an argumentative ques-

(Deposition of Lloyd R. Arnold.)

tion. I object to that question as assuming something not in evidence.

A. I didn't get that.

Mr. Goodman: Q. Well, I will put it this way to you: You are familiar with the minute books—you have looked at them from time to time?

A. Yes, I have.

Q. And you have no doubt noticed from an examination of the minute books that there were dozens of meetings of the Board at which the minutes weren't signed and at which consents were not signed?

Mr. Scampini: Well, now, I object to that question——

A. I can answer it.

Mr. Scampini: Wait a minute, now. I want to preserve the record, and then you can answer it. I will object to that question on the ground that it is incompetent, irrelevant and immaterial. There is nothing in the law requiring the minutes to be signed. That is only a formality. Whether or not they were lawfully convened and were present and acted upon the proposals that were submitted to them—that is the only thing that is required.

Mr. Goodman: I am asking for the witness' recollection of that.

Mr. Scampini: Then I submit that the minute books speak for themselves with respect to that question.

Mr. Goodman: Q. Will you answer the question?

(Deposition of Lloyd R. Arnold.)

A. I know that all those signatures of the directors aren't on every waiver there; I realize that. That is probably just due to negligence, because they had proper notice, in any case.

Mr. Goodman: Q. And that was equally true with respect to the meetings of the executive committee, was it not?

Mr. Scampini: The same objection.

A. It may be true, yes. I would have to look at those minutes.

Mr. Goodman: Q. Do you know how it came about that this proceeding was started in Delaware?

Mr. Scampini: Well, I renew my objection that it is *dehors* the record, outside the issues of the case; that you are now attempting a collateral attack; it is outside the scope of the direct examination; it is an improper question and incompetent, irrelevant and immaterial, and you haven't laid the foundation for it. It certainly is outside the issues of the case.

Mr. Goodman: Q. Do you know how it was started?

A. Well, if I can get what the question is—in other words, the first that we knew of any pending action was when we got our letter from Delaware. I certainly didn't know anything about that, where it came from or——

(Mr. Scampini hands letter to the witness.)

A. This is the one, yes.

Mr. Goodman: Q. Had you consulted with Mr.

(Deposition of Lloyd R. Arnold.)

Scampini before you received that letter from Delaware?
A. I don't believe so.

Q. Well, do you know whether you had or not?

A. I don't believe so.

Q. Did Mr. Maffei to your knowledge confer with Mr. Scampini before this letter was received?

A. Well, I don't know. I think we had luncheon once there. Mr. Maffei may have. I am not sure.

Q. Well, at the time of those luncheon meetings with Mr. Scampini did you have any discussion concerning the Bercut transaction with Mr. Scampini?

A. I had no discussion about any action of that sort, no.

Q. What if anything did you discuss with him concerning the bringing of the proceeding in Delaware, if you had such discussion?

A. No, that is what I say, we had no discussion along those lines. We had a general discussion. After all, Mr. Scampini was once connected with the company, and we discussed various things that had transpired in recent years.

Q. And among the matters that you discussed at these luncheon meetings with Mr. Scampini was the matter of the Bercut transaction?

A. It would have been discussed.

Q. Well, was it discussed?

A. That was discussed along with any other things in order——

(Deposition of Lloyd R. Arnold.)

Q. Well, your statement, then, is that it was discussed?

Mr. Scampini: "Yes"—isn't it?

Mr. Goodman: Well, I don't know.

Mr. Scampini: You have got it already in the record. What more do you want? I will stipulate that it was, to relieve you of all uncertainties.

A. Well, I was still talking about luncheons here. That is why I was hesitating—to see what it was.

Mr. Goodwin: Q. We are talking about the same thing, Mr. Arnold.

A. Yes, I believe it was discussed in those discussions.

Q. And how long would you say that it was that those luncheon meetings were held before the receipt of this letter from the attorney in Delaware?

A. Well, I don't know without having to think a lot. It was purely a social meeting, resuming our acquaintance after all——

Q. Well, would you say it was a month before you got this letter? Would that be a fair approximation of the time?

A. We owed Mr. Scampini money, and we talked on the phone—well, I would say during thirty or sixty days, along in there. I was away a lot.

Q. Well, had Mr. Scampini made any request for a settlement of his obligation of the company?

A. I think from time to time he had asked for some payments on it, yes.

Q. And did you propose any plan by which Mr. Scampini could get paid the amount that was owing

(Deposition of Lloyd R. Arnold.)

to him from the company? A. No, we didn't.

Q. Was there any discussion at any of those luncheon meetings as to any method of paying Mr. Scampini's unpaid bill for services to the company?

A. No, I believe we told him the same as we did everybody else, it was just one of those things—we couldn't pay it.

Mr. Goodman: May I see this letter? (Examining letter.) In connection with this witness' testimony I will ask that the letter of July 16th, 1942, from Thomas H. Wingate, Attorney at Law, Wilmington, Delaware, to Pacific Empire Holdings, Inc., be marked for identification.

Mr. Scampini: Well, I object to it, merely for the purpose of the record, on the ground that you are going outside the scope of the direct examination and the issues of the case, and it is incompetent, irrelevant and immaterial.

Mr. Goodman: May it be marked, Mr. Reporter, as "Defendants' Exhibit A for identification"?

(Said letter marked "Defendants' Exhibit A for identification.")

Mr. Goodman: Q. At the meeting of the directors of August 20th, 1942, was there any statement made by either Mr. Scampini or any of the directors or officers of the company that the corporation was going to be one of the plaintiffs in a proposed action against Mr. Bercut?

Mr. Scampini: I will object to that as incompetent, irrelevant and immaterial, and not within the

(Deposition of Lloyd R. Arnold.)

scope of the direct examination, and not having any bearing upon the issues of the case.

A. I would have to answer that this way, that a lot of matters were up for discussion, prompted by this letter, and we wanted to cooperate and go along with them.

Mr. Goodman: Q. And with whom did you want to cooperate and go along?

A. With whoever this group of stockholders were.

Q. And without knowing who they were?

A. Well, oftentimes in stockholders' actions you don't know. They get together, and there is nothing—

Q. Well, did you just determine in this meeting, without knowing more, that the corporation was going to cooperate with the stockholders of whom you knew nothing in Delaware?

Mr. Scampini: Well, Mr. Goodman, may I ask if that is any of your business?

Mr. Goodman: Oh, yes.

Mr. Scampini: What is the matter? Don't you like to have your client sued by a receiver?

Mr. Goodman: Well, now, Mr. Scampini, we have all been getting along very well in this examination—

Mr. Scampini: Why don't you wait until the time of trial, for the court to tell you whether this is proper or not?

Mr. Goodman: Well, because I see fit to do it

(Deposition of Lloyd R. Arnold.)

this way. If you have any objection, just make your objection.

Mr. Scampini: Well, Mr. Goodman, I haven't gone into the matter. You know that as well as I do, that that is a matter that is outside of the case.

Mr. Goodman: Well, that is where you and I disagree, Mr. Scampini. You make your objection, and we will let the court pass on it. Will you read the question, please?

A. I have forgotten where I left off.

(Pending question read.)

A. Well, I'll say this, that our whole conversations were based upon preserving the corporation. If it had any rights any place, why, the company was willing to join and go along on that basis in order to make the company—to cause the company to survive and go ahead, wherever it might lead.

Q. And was it the substance of your discussion at those directors' meetings that the only possible way that the company could preserve itself would be by bringing—joining in this equity proceeding so that an attempt could be made to proceed against Mr. Bercut to get the stock back in the Merchants Ice?

A. No. That is what I am trying to say. In other words, that was joined by this letter, this action—this threatened action; and after discussing everything with Mr. Scampini, the only solution seemed to be a receivership, with the idea of pro-

(Deposition of Lloyd R. Arnold.)

tecting the company and, if it had any rights legally or otherwise, to work it out.

Q. Well, you knew that the Pacific Empire Holdings Company at that time, and the time of this meeting, had no assets of any value at all, did you not—of any material value?

Mr. Scampini: It had none.

A. Well, I know this, that whatever we had or whatever we didn't have, we had ever since we left the Merchants been working on a plan where we could keep the company going.

Mr. Goodman: Q. Well, you have testified on your direct examination here, in answer to Mr. Scampini's question, that there were large amounts of money that the Pacific Empire Holdings Company owed, and that it had no assets of any value at all. That is right, isn't it? A. Yes, that is correct.

Q. All right. Now, what did you have in mind and what did you discuss at the directors' meeting of August 20th, 1942, about preserving assets of your company that were of no value in connection with this equity receivership?

A. Well, we hoped by putting it in receivership that we could probably settle with some of our creditors.

Q. How did you hope to settle with any of your creditors when you had no assets?

Mr. Scampini: For the purpose of the record let it be shown that I object on the ground that the question is argumentative and assumes something

(Deposition of Lloyd R. Arnold.)

not in evidence; that it is outside the issues of the case, and that our contention is that this company owns the Merchants Ice & Cold Storage Company stock of which Mr. Bercut claims to be the owner, and owns other assets of which other people claim to be the owners.

A. Well, as far as some other assets are concerned, why, it seemed to be the legal construction that we did own them, and the company could be put in receivership, or we could go ahead—which-ever was the best.

Mr. Goodman: Q. In other words, was the consensus of opinion, after you had consulted with Mr. Scampini at the directors' meeting, that the real purpose of the proceeding in Delaware was to arrange for the bringing of an action against Mr. Bercut to try and recover some assets? Isn't that right?

Mr. Scampini: I object to that as assuming something not in evidence and purely argumentative.

A. No, I can't say that that was the main purpose.

Mr. Goodman: Q. Well, what purpose did you have in mind, then, in consenting to an equity receivership away off in Delaware, Mr. Arnold, on the advice of Mr. Scampini, other than that you had no assets in the company?

Mr. Scampini: Well, that is an argumentative question and outside of this case, and incompetent,

and L. R. Arnold, secretary-treasurer.

irrelevant and immaterial, and not within the scope of the direct examination.

A. Well, answering your first question there, about the purpose——

Mr. Scampini: It is asking for a conclusion of law, too.

A. I don't know—I mean it was a Delaware corporation, and I thought you had to go to Delaware for anything like that, and that naturally came out after we asked Mr. Scampini what to do about this. As to whether its whole purpose was to proceed against Mr. Bercut, I can't admit that. It was after going to counsel or obtaining legal advice after this thing started; if the corporation had any rights or anything it could recover, or anything like that—well, that is entirely legal; I mean that is——

Mr. Goodman: Q. Well, in other words, I am correct in saying, am I not, Mr. Arnold——

Mr. Scampini: I object to your starting to say that you are correct in the way you are asking questions, Mr. Goodman. Let him answer subject to the objection.

Mr. Goodman: Well, Mr. Scampini, this is cross-examination. I am going to word my questions just exactly the way I want to, and there is no objection to it. It is proper cross-examination. I have a right to lead the witness——

Mr. Scampini: Oh, yes, I will stipulate to that.

Mr. Goodman: (Continuing:) ——in my ques-

(Deposition of Lloyd R. Arnold.)

tions in any way I want, so I am asking leading questions. I don't want to get in any argument over this thing.

Mr. Scampini: No, neither do I.

Mr. Goodman: But I just call your attention to the fact that you can't possibly have an objection to a question that I haven't even started to make yet.

Q. Mr. Arnold, am I correct in stating that after advising with your counsel you knew that the way and were informed that the way to bring the proceeding against Mr. Bercut to recover this stock or damages, was by going through this equity proceeding in Delaware?

A. I will have to say the same thing that I said before, that the directors were cooperating with whoever these stockholders were, to go along on any action. Naturally, we discussed all matters relating to the company, whatever its obligations and whatever assets it should have or could recover. It was all discussed, and the receivership seemed to be the only way to go about that to protect the corporation and—well, exercise whatever rights it might have legalwise, or whatever you want to call it.

Q. And among those rights that it might have legalwise was the question of the Bercut suit? That is correct, is it not?

A. Yes, that is correct.

Q. And you did discuss the matter of the Bercut suit as one of the things that could be accomplished in this equity receivership, did you not?

(Deposition of Lloyd R. Arnold.)

A. I have already said that, yes.

Q. And you discussed that with Mr. Scampini, your counsel, long before you had this meeting of August 20th, 1942? A. Yes.

Q. And it was upon Mr. Scampini's legal advice that these various steps were taken, was it not?

A. Yes.

Q. In January, 1941, was the Pacific Empire Holdings Company represented by counsel?

A. In January, 1941?

Q. Yes, at the time you made the Bercut deal?

A. No, we had no—the holding company had no counsel.

Q. At that time? A. No.

Q. What was the last time prior to January of 1941 that the company had any attorney that advised it?

A. As a counsel for the holding company, I don't believe—I don't believe we had any one after Mr. Scampini resigned. I may have gone for advice to somebody. We had this government suit pending, but that was an out-and-out—well, you might say hiring of legal counsel.

Q. Now, the Bercut transaction was entered into in January of 1941? A. That is correct.

Q. Bear that date in mind, please. During the year 1941, from January until December of 1941, did you or—strike that out. During the year that you have mentioned, from January, 1941, to the end of the year, did the Pacific Empire Holdings

(Deposition of Lloyd R. Arnold.)

Company have any more or less indebtedness than it did during the year 1942 up to the present time?

A. Well, during 1941——

Q. That is a little complicated, and I will re-frame it. Was there any change——

Mr. Scampini: Any material change.

Mr. Goodman: Q. (Continuing:) ——any material change in the amount of the indebtedness of the Pacific Empire Holdings Company from 1941 to August 20th, 1942?

A. Well, yes, there was.

Q. In what respect did that indebtedness change?

A. A general reduction of obligations, I would say.

Q. In other words, in August, of 1942, the company owed less money than it did in January, of 1941?

A. Oh, yes.

Q. And when did that decrease take place, in obligations? Was that a gradual decrease, or did it occur at any particular time?

A. Well, there was a gradual decrease of obligations—well, when we sold our bank stock there was a decrease.

Q. Well, let me put it to you this way, just in round numbers and without going into detail, approximately how much did the company owe in January of 1941?

A. In January of 1941?

Q. Yes, at the time of the deal?

(Deposition of Lloyd R. Arnold.)

A. Do you want me to include subsidiaries in that?

Q. No, just obligations of the Pacific Empire Holdings.

A. You mean to our subsidiaries—the whole thing?

Q. Yes, everything.

A. Well, *everybody* it would be—let's see—it certainly must have been up around two hundred and fifty thousand—something like that.

Q. And on August 20th, 1942, at the time you had this directors' meeting recently, about how much was the indebtedness of the company at that time?

A. About—at least a couple of hundred thousand, I'd say.

Q. So there wasn't any great, material difference, was there, in how much it owed? You might have paid off some small——

A. No, there was a difference there—that is what I am trying to figure here—because when we sold our bank stock we retired our bank loans. That was fifty thousand there——

Mr. Scampini: Wasn't that to the corporation, Pacific Empire Corp.?

Mr. Goodman: I am just talking about the Pacific Empire Holdings now.

A. Yes. I guess most of it was in the corporation—probably all of it. I would have to look that up.

(Deposition of Lloyd R. Arnold.)

Q. Well, what I am trying to get at—and correct me if I am not correct in what I say—is that the indebtedness of the Pacific Empire Holdings Company was not substantially different in August of 1942 than it was in January of 1941 at the time of the Bercut transaction?

Mr. Scampini: I will stipulate to that, because the books will show, Mr. Goodman.

Mr. Goodman: Well, I am just trying to get his recollection.

Mr. Scampini: Substantially the same—approximately.

Mr. Goodman: Q. Is that statement that Mr. Scampini made—is that, to your recollection, substantially correct, Mr. Arnold?

A. Well, I guess it is. I would have to check it.

Q. But you believe that it substantially is correct?

A. Well, my hesitancy is only because, I think—I know that we were whittling down a lot of items during that time, and of course there was accruing interest on everything else, so I suppose it ended up in a substantial reduction. I guess that is about the way I would have to figure.

Q. So there really wasn't any substantial difference in the financial condition of the Pacific Empire Holdings Company during the period from January, 1941, to August 20th, 1942?

A. Oh, there was a substantial difference in the financial condition, yes.

and L. R. Arnold, secretary-treasurer.

Q. In what way?

A. You were talking about the situation before the Pacific Empire Corporation lost its bank stock. We had a 52 or 53% interest in the Pacific Empire Corporation, and on or about this time——

Q. When did that occur?

A. We lost our corporation stock by pledge.

Mr. Scampini: What do you mean by that? Be very explicit in that respect, Mr. Arnold.

A. I beg your pardon?

Mr. Scampini: Tell what you mean when you say "corporation stock." That doesn't mean anything. Tell what happened. Give the details.

Mr. Goodman: Well, now, I am asking the questions.

Mr. Scampini: I know, but for the purpose of the record "we lost our corporation stock" is not clear.

A. Well, I am talking about it—I am familiar with it, so I probably am not expressing it right. We had Pacific Empire Corporation stock pledged with Mr. Chase, our landlord, and that was foreclosed on and taken over.

Mr. Goodman: Q. Now, that Pacific Empire Corporation stock lost value because of the fact that it lost its stock in the Pacific National Bank?

A. That is correct.

Q. And when did that occur approximately?

A. Oh, in February or March, I believe, of this year—somewhere along there.

(Deposition of Lloyd R. Arnold.)

Q. 1942? A. 1942, yes.

Q. And when did you—you are speaking now of the loss of the corporation stock—or the loss by the corporation of the stock——

A. I was speaking of the loss by the corporation of the bank stock.

Q. And when did you lose the corporation stock?

A. We lost the corporation stock, oh, sometime about thirty days ago, I guess.

Q. I see. Now, during the year 1941——

Mr. Scampini: May I interrupt, Mr. Goodman?

Mr. Goodman: Yes.

Mr. Scampini: You say “we lost the corporation stock.” What do you mean by “we”?

A. In other words, a note owing by Pacific Empire Holdings Corporation to Kohler & Chase. They demanded payment, and then they foreclosed on the collateral and took it over.

Mr. Scampini: What I mean to say, Mr. Arnold, is that the use of the word “we” is very misleading. You are not the holding company. You are just an officer. Instead of saying “we” say “Pacific Empire Holdings,” or whatever you mean by “we.”

A. Well, I will do that. I didn’t know what else to say.

Mr. Goodman: Q. Well, the Pacific Empire Holdings had—let’s see, now—it was Pacific Empire Corporation stock, the Pacific Empire Corporation, that was pledged to Kohler & Chase?

and L. R. Arnold, secretary-treasurer.

A. It was stock of the Pacific Empire Corporation that was pledged to Kohler & Chase.

Q. By Pacific Empire Holdings?

A. By Pacific Empire Holdings.

Q. To Kohler & Chase? A. That is right.

Q. And that was foreclosed, you say?

A. That was foreclosed.

Q. And when did that take place—that foreclosure? A. As I say, about thirty days ago.

Q. And that pledge was given as security for a note of the Pacific Empire Holdings to Kohler & Chase? A. That is right.

Q. Do you recall approximately how much that note was? A. The note to Kohler & Chase?

Q. Yes.

A. Well, I believe it was around thirteen thousand.

Mr. Scampini: Well, outside the record.

A. The note was subsequently reduced by payments, and I don't know to what figure; and then we—the rent has been accruing, which we didn't pay, and I think there still is around the figure of—I think somewhere around thirteen or fourteen or fifteen thousand, probably. I would have to look it up.

Mr. Goodman: Q. You don't know whether that is all represented by a note?

A. No, I don't. I would have to look it up. It is not all represented by a note.

(Deposition of Lloyd R. Arnold.)

Q. Kohler & Chase is maintaining an action, is it, against the holding company on that obligation?

A. Well, I assume it is, yes.

Q. You gave your deposition in that action?

A. Yes.

Q. Now, during the year 1941 and after the transaction with Mr. Bercut, did you at any time discuss with Mr. Maffei or with any counsel the matter of the Bercut transaction?

A. During what period again? Will you give me that?

Q. During the period from January, 1941, to the end of 1941. A. No.

Q. You regarded that as a closed transaction, did you not—the Bercut transaction?

A. Well, we hadn't thought far enough along on it.

Q. Didn't you regard it as a closed transaction?

A. At that time I did, yes.

Q. And during the year 1941, at no time did you and Mr. Maffei discuss the Bercut transaction with respect to attempting to set it aside in any way, did you?

A. We discussed it many times, but I don't think with the idea of setting it aside. We didn't feel that we had made a very good deal. I know that.

Q. Well, why didn't you feel that you had made a very good deal?

A. Well, we lost the major asset, of course, and it didn't leave us in very good condition?

(Deposition of Lloyd R. Arnold.)

Q. Let's see—the major asset of the Pacific Empire holdings was this stock in the Merchants Ice? That is right, isn't it?

A. Yes. Our whole program was built around that.

Q. And at that time you were of course the president, as you have already testified, of Merchants Ice?

A. Yes.

Q. And did the stock of Merchants Ice, either the common or the preferred, to your knowledge, have any market value in January of 1941?

Mr. Scampini: We object to that as incompetent, irrelevant and immaterial.

A. It was an unlisted—pardon me?

Mr. Scampini: Go ahead and answer the question.

A. It was an unlisted stock. There wasn't much of a market. It wouldn't mean anything anyway.

Mr. Goodman: Q. Nobody was buying it or selling it—was there?

A. It was bought and sold from time to time in small lots.

Q. At or about January, 1941?

A. Oh.

Q. Or just prior thereto?

A. I don't know of any sales right then. I would have to look it up. I didn't know, I mean.

Q. Well, you knew at the time you made the transaction with Mr. Bercut that there was no market for that stock, didn't you?

A. There was no market for it. I grant that.

(Deposition of Lloyd R. Arnold.)

Q. Nobody would pay anything for it? That is a fact, isn't it, Mr. Arnold?

Mr. Scampini: I object to the question as assuming something not in evidence.

Mr. Goodman: Well, the witness knows.

Mr. Scampini: Well, that is asking for the conclusion of the witness.

A. Well, what I am trying to say is this: Being an unlisted stock, there was no active market on its stock, and blocks of stock—

Mr. Goodman: Q. Well, Mr. Arnold, in January of 1941, when both companies were in desperate straits, if there was any way that you could have sold the Pacific Empire stock to receive anything in excess of, let us say, fifty cents a share, you would have investigated and looked into that, wouldn't you? As president and general manager of Pacific Empire Holdings you would, wouldn't you?

A. I naturally wanted to make the best deal possible, of course.

Q. And you would have looked into and investigated to see whether or not you could have received any substantial price for the shares of Merchants Ice?

A. We were talking about market—as to the market. Well, it would have been ridiculous for me to go on the market, because there was no market.

Q. There was no market. Well, you did make some effort, did you not, Mr. Arnold, to find some

(Deposition of Lloyd R. Arnold.)

one who would buy the stock of Merchants Ice from the Pacific Empire?

A. Well, I have already stated that, yes.

Q. Yes. And you couldn't find any one that would buy it, could you?

A. Well, I hadn't found anybody up to that time, but——

Q. Well, the reason why you couldn't find any one to buy it was because the Merchants Ice was in a hopeless financial condition at that time? Isn't that right?

Mr. Scampini: I object to it as an argumentative question, and assuming something not in evidence.

Mr. Goodman: He was president of the company.

Mr. Scampini: But your statement that it was in a hopeless condition—you don't know it was.

Mr. Goodman: I am asking the witness the question.

Mr. Scampini: Well, that is asking for his conclusion. It certainly didn't turn out to be hopeless. As soon as Mr. Peter Bercut got there, who was a competent business man, it became a very fine concern.

Mr. Goodman: Well, that is very true.

Mr. Scampini: That is only the Merchants you are talking about now—the Merchants Ice Company. I am willing to admit that Mr. Peter Bercut is a better manager than Mr. Arnold.

Mr. Goodman: Well, that is not disputed.

Mr. Scampini: Why do you ask those questions?

(Deposition of Lloyd R. Arnold.)

You know very well they are not proper cross examination.

Mr. Goodman: Will you read the last question, Mr. Reporter?

(Pending question read.)

A. I would not say that it was a hopeless condition, no. I have stated the reasons why. It was a combination of things. The future was there. I can't deny that.

Q. You stated in your direct examination the other day that you had to make this deal.

A. I cited the circumstances.

Q. Now, after the first of the year 1942 and during the first six months, let's say, up to June of 1942, did you have any discussion with Mr. Maffei during that period of time with respect to the Bercut transaction?

A. We had numerous discussions.

Q. And did you discuss at that time with Mr. Maffei, now that the Merchants Ice seemed to be doing a little better business, the idea of trying to set aside the Bercut transaction?

A. No, we often commented on how well we heard they were doing.

Q. And you didn't discuss at that time any plan for setting aside the transaction with Mr. Bercut, during the first six months of 1942?

A. The first six months of 1942?

Q. From January 1st of June 30th, 1942—that is, this year?

(Deposition of Lloyd R. Arnold.)

A. We didn't discuss any plan.

Q. When did you and Mr. Maffei first discuss between yourselves the idea of trying to set aside the Bercut transaction?

A. Well, I think a lot of our discussion took place when we were reviewing the entire situation affecting the company with counsel. We didn't know what our rights were—the holding company didn't know its rights.

Q. Then am I correct in saying that the first time that you and Mr. Maffei—now, if I am not correct, correct me—discussed the setting aside of the Bercut transaction or attempting to set it aside, was when you and Mr. Maffei first discussed it with Mr. Scampini?

A. As far as any plan concerning that, or anything else affecting the holding company, it was only discussed when we were attempting to salvage the company.

Q. Well, was the first time that you and Mr. Maffei discussed the idea of setting aside or attempting to set aside the Bercut transaction, upon the occasion when you first consulted with Mr. Scampini concerning the matter? Was that the first time that that was discussed? If it wasn't, then I want to know when you first did it?

A. Well, Mr. Maffei and I have had numerous discussions about it in the past and present, and how to save the company. While we had no plan, it would certainly have been fine for the holding

(Deposition of Lloyd R. Arnold.)

company if it would have some position in the Merchants. We had often discussed that in a general way.

Q. You had discussed that it would be a good thing if you could get back into the Merchants again?

A. We did—if we still had a good stock position in the Merchants, it would be nice; it was doing a good business.

Q. When was the first time that you and Mr. Maffei discussed about it being a good idea to get back into the Merchants Ice again?

A. Well, just as I say, we had no—in our discussions we had no definite plan to do that.

Q. Now, listen to the question, please. Read the question, please.

(Pending question read.)

A. No, as far as—we had no discussion about getting back into the Merchants Ice.

Q. Well, you said a moment ago——

A. That sounds as if we were going to move back.

Q. Then I will repeat my other question again, and let's see if we can get an answer: When was the first time that you and Mr. Maffei ever discussed the idea of trying to set aside the Merchants—the Bercut transaction, and recovering the Merchants Ice stock for the Pacific Empire Holdings Company?

A. Our first discussions along those lines were

(Deposition of Lloyd R. Arnold.)

with counsel after we were reviewing the—all matters relating to the company.

Q. So that you never had any discussion between you and Mr. Maffei concerning this matter until you first discussed it with Mr. Scampini? Is that right?

A. We mentioned about a plan—our legal rights, yes.

Q. And whose suggestion was it—yours or Mr. Maffei's—that you would consult with Mr. Scampini concerning the Bercut transaction?

A. There was no discussion between us about—maybe I didn't get that.

Mr. Goodman: Will you read the question, please, Mr. Reporter?

(Pending question read.)

A. We had no discussion about consulting with Mr. Scampini for that purpose of getting back, as you say, into the Merchants. Our whole discussions originated right here on or about this time that we received the letter from Delaware.

Q. Now, a little while ago, in answer to my questions, you told me of luncheon meetings that you and Mr. Maffei had with Mr. Scampini?

A. Yes, that is correct.

Q. At which you discussed the Bercut transaction?

A. Yes, that is correct.

Q. Now, in those meetings did you discuss the legal question with Mr. Scampini as to whether or not that Bercut transaction could be set aside?

(Deposition of Lloyd R. Arnold.)

A. There was no discussion at those meetings—there was only one or two, social getting togethers.

Q. Well, you have already told me, Mr. Arnold, that you did discuss the Bercut transaction at those luncheon meetings with Mr. Scampini.

A. Yes.

Q. That is true, is it not?

A. That is correct.

Q. All right. Now, was there any discussion in connection with the Bercut transaction at those luncheon meetings, with reference to the method by which the transaction with Bercut could be set aside?

A. I don't recall that we discussed it—any plan, no.

Q. Well, did Mr. Scampini have any suggestion to make as to what could be done in that regard, at those luncheon meetings?

A. I can only repeat that we discussed most developments, and particularly that one of the Bercut transaction, when we were telling Mr. Scampini what had more or less happened since he wasn't associated with the company.

Q. Will you please now answer my question? I will repeat it again. Did Mr. Scampini make any suggestion in those luncheon meetings as to whether or not the Bercut—whether or not and how the so-called Bercut transaction could be set aside?

Mr. Scampini: Why didn't you ask him if Mr.

(Deposition of Lloyd R. Arnold.)

Scampini expressed any opinions on it, Mr. Goodman?

Mr. Goodman: Would you read the question again, Mr. Reporter?

(Pending question read.)

A. I don't recall any discussion of a plan, at least while I was present.

Q. Well, did Mr. Maffei at that time authorize Mr. Scampini—in those luncheon meetings authorize Mr. Scampini to go ahead and investigate the matter?

A. We hadn't arranged at that time yet.

Q. Well, how did—what if anything was said by Mr. Maffei or yourself as to whether or not Mr. Scampini should look into the matter?

A. I don't recall anything like that. Our main discussions on this whole subject came up after Mr. Scampini was going to represent us on this Delaware proceeding, and then we reviewed everything, and he gave his opinion on it.

Q. Well, now, at the times that you had the luncheon meetings with Mr. Scampini, at which this Bercut transaction—

A. May I correct that "luncheon meetings"? I think we had only one or two. I am not sure.

Q. I am not trying to hold you down to that, whether you had one or two; I am not concerned with that. Referring again, now, to the luncheon meeting or meetings, whichever they were, with Mr. Scampini, did nothing happen with reference to

(Deposition of Lloyd R. Arnold.)

authorizing Mr. Scampini to proceed until you had received this letter that has been offered here in evidence, of July 16th, 1942?

A. All of our conversations were all about this same time. I think they were all prompted by that.

Q. Well, at any—at either or all of these luncheon meetings that you had between Mr. Maffei and yourself and Mr. Scampini, did Mr. Scampini say that he would investigate the matter and start any proceedings in Delaware?

A. I think in the general conversations, when we talked about the Bercut transaction and others, that he may have expressed the opinion that the corporation probably had some rights in the matter.

Q. And did Mr. Scampini in those luncheon meetings or meeting—meeting or meetings—tell you what could be done under the Delaware law?

A. Well, nothing other than what the proper steps were that we should take in order to protect the company.

Q. No, I am talking about the luncheon meetings, Mr. Arnold. A. Oh.

Q. At the luncheon meetings, before this thing—

A. Oh, no, no.

Q. (Continuing) —he didn't advise you what could be done about the Delaware—

A. About the steps in Delaware?

Q. Yes.

A. No, the steps in Delaware were prompted by this, by these proceedings, which we were certainly advised of.

(Deposition of Lloyd R. Arnold.)

Q. Now you say that these luncheon meetings or meeting with Mr. Scampini took place maybe a month before this letter came?

A. Yes, something like that.

Q. And part of the discussion at the luncheon meetings I think you said was concerning payment of the obligation owing to Mr. Scampini?

A. That was one of the things.

Q. Did the two persons who were named in the complaint in this action as having instituted the equity proceeding in Delaware—Tanzer and Wilhelm—ever to your knowledge make any demands of any kind upon the Pacific Empire Holdings Company prior to the time that you received this letter from Mr. Wingate of July 16th, 1942?

A. No, I had no other demands that I recall.

Q. You had never heard of any claim that they had against the company? A. No——

Q. Up to the time that you received this letter from Mr. Wingate?

A. No. The only thing I could think about is that people, I assume, often assign their claims, or whatever they might have, to others, and I thought probably it might be one of our larger creditors—Mr. Chase or somebody——

Q. So up to the time that you saw the complaint in this action you didn't know who these people were, either Mrs. Wilhelm or Tanzer—Mrs. Tanzer? You had never heard the names before?

A. No.

(Deposition of Lloyd R. Arnold.)

Q. The first time you ever heard of them was when you saw their names in the complaint? Isn't that right? A. Yes.

Q. And no stockholder or creditor had ever, prior to the time that you received this letter from Wingate, advised you that he or they were going to start any equity proceeding against the corporation in Delaware?

A. We had all kinds of pressure from creditors, but we weren't advised of what action they were taking, other than Mr. Chase, who filed action against us on or about that same time.

Q. So the first time you knew about any equity proceeding in Delaware was when you received this letter from Mr. Wingate?

A. Yes, that is correct.

Q. That came out of a clear sky? Is that right?

A. Yes.

Q. You had no advance information of any kind that this proceeding was going to take place in Delaware? A. That is right.

Q. Now, do you know whether either one of these people, Mrs. Tanzer or Mrs. Wilhelm, was a creditor of the Pacific Empire Holdings?

A. I didn't know which it would be. As I said before, that group of stockholders—I had been in contact with those things before, and you never know who it is—a creditor. It could be assigned to somebody else, I assume. It might have been Chase or any one.

(Deposition of Lloyd R. Arnold.)

Q. Now, do you recall in 1938 the purchase by the Pacific Empire Holdings of some shares of Merchants Ice & Cold stock?

A. We purchased small amounts from time to time. I don't—in 1938, you say?

Q. Yes. A. I don't know.

Q. You don't recall that, by way of your recollection?

A. No. It was probably some small block—no, wait a minute—wait a minute.

Q. Well, I will refresh your recollection in this way: Do you remember that on February 25th—on or about February 25th, 1938, the Pacific Empire purchased 5516 $\frac{2}{3}$ shares of the preferred stock of Merchants for the purchase price of \$7,604.68?

A. Oh, I know what that was, yes—I think I know the block without referring to it—I think that is when Mr. Sherman, who was then president of the Merchants, was carrying some stock at the Anglo, and Louis Sutter, a vice-president of the Anglo—I think that was his title—he was on the Board of the Merchants also, who were banking at the Anglo, and he wanted to sell his stock at the same time, and he wanted to clean up the obligations of Mr. Sherman. I think we were guarantors on that, so we bought his, including the other block, and consolidated them and issued our note on it.

Q. And do you remember what the relation was between the price that you paid for that stock and the market for the stock at that time?

(Deposition of Lloyd R. Arnold.)

A. The stock that Mr. Sherman had was somewhere around the market, I think, that he picked up. The stock of Mr. Sutter—in fact, it was after a directors' meeting when he asked me if we wouldn't buy his stock, and we arrived at a price there. I can't think now exactly what it was, and I can't remember whether it was preferred or common either.

Q. Well, preferred was one twenty-five a share.

A. It was common or preferred.

Q. I am talking about preferred.

A. Preferred?

Q. Yes. It was around a dollar and a quarter a share in February of 1938.

A. Yes. Well, preferred stock, we paid anywhere up to as high as two and a half, I think, for.

Q. In 1938? A. Well, I don't know.

Q. Well, do you know what common stock was selling for at that time?

A. Well, common stock sold anywhere from—

Q. In 1938, I mean.

A. I would have to check on that.

Q. You haven't any present recollection of that?

A. Well, I would just say anywhere up to seventy-five or a dollar, or something like that.

Q. For the common stock? A. Common.

Q. In January of 1941 the executive committee of the Pacific Empire Holdings Company consisted of, you say, Mr. Bercut, yourself, and Mr. Maffei?

A. Yes, the last committee was that.

Q. And that committee was the committee that

(Deposition of Lloyd R. Arnold.)

was appointed by the board of directors following the annual meeting of January, 1940—or February, 1940? Isn't that right?

A. It was always—the committee was appointed at the same time the officers were at each organization meeting.

Q. In order to get the record clear, the executive committee appointed by the board of directors in their meeting following the annual meeting of February, 1940, consisted of yourself, Mr. Maffei, and Mr. Bercut?

A. Yes, that is correct.

Q. Now, you said that at or about the time of the confirmation of the transaction with Mr. Bercut you received his resignation as a director?

A. That is correct.

Q. Now, then, after the resignation of Mr. Bercut was received by you, before the transaction was finally closed, there were then left on the executive committee yourself and Mr. Maffei? Isn't that correct?

A. If that were the case, that would be it, yes.

Mr. Scampini: That of course is assuming—that is asking for a conclusion of law, as to when——

Mr. Goodman: Well, of course that may be so.

Q. Now, I want to call your attention to the section of Article VII of the by-laws which refers to the powers of the executive committee, to which Mr. Scampini referred a short time ago, and read it to you and ask you a question concerning it:

“Any executive committee appointed by the board

(Deposition of Lloyd R. Arnold.)

of directors shall have authority to exercise all the powers of the board of directors when said board is not in session, but subject to the immediate disaffirmance by the board at its next meeting after receiving the report of the acts done by said committee. Such committee may act by the written consent of all its members although not formally convened."

A. Yes.

Q. Now, it is a fact, is it not, that you frequently made, entered into or concluded business transactions by the executive committee without formerly convening a meeting of the committee? Isn't that true?

A. There were occasions like that, yes.

Q. And if the committee actually signed some document or entered into such a transaction—or entered into a business transaction whereby all of the members of the committee signed the documents having to do with the transaction, you wouldn't hold a meeting of the executive committee besides that, because you would consider that that was the action of the committee, wouldn't you? I mean in the normal course of your conduct of the affairs of this corporation. That is a correct statement, isn't it? Or have I made that too complex?

A. Well, there is just one part of it I missed near the first; I didn't quite get your construction of it. If you will just repeat the first part of it so I can get it.

(Pending question read.)

and L. R. Arnold, secretary-treasurer.

Q. Is that a little too complicated to answer, or do you get what I am driving at?

A. Well, I think I get what you mean there.

Q. Well, if it is causing you some uncertainty in answering it, let me reframe it this way: In lieu of holding a formal meeting of the executive committee, if you actually consummated a transaction that required the signatures of the executive committee, that would be sufficient, wouldn't it, without holding a meeting of the committee itself besides signing the documents that would be involved?

A. No.

Q. Did you frequently do that?

A. Well, I would perform duties that I thought were within my own authority. If I thought it necessitated a meeting——

Q. I am not talking about you alone, Mr. Arnold.

A. No—any officer of the company.

Q. Well, you and Mr. Maffei and Mr. Bercut were the executive committee.

A. That is right.

Q. For a certain period of time.

A. That is right.

Q. Now, if you entered into a transaction in which all of you signed——

A. Yes.

Q. (Continuing): ——you would not call a meeting of the executive committee besides, would you?

A. No. I didn't get the question. No, that is correct.

Mr. Scampini: You mean by "signed"—you mean approved the minutes, or something?

(Deposition of Lloyd R. Arnold.)

Mr. Goodman: Q. Well, I am not speaking of the minutes. I am talking about a business transaction involving the signing of some documents. If you and the other members of the executive committee actually signed the documents which had to do with the transaction, you wouldn't need to call the executive committee, because you had already signed the documents that were involved in the transaction. That is what I am trying to point out to you. Have I made that clear?

A. Yes, I see that now.

Q. You did that very often, didn't you?

A. Well, if every member was on an agreement or transaction, that was also a member of the committee, well, I don't think I would call a special meeting if we were all familiar with the transaction.

Q. Yes. Now, let me ask you just a couple more questions there, and then we will take an adjournment. Did you discuss your testimony on this deposition with Mr. Scampini before the commencement of the deposition?

A. No, there was no discussion of it; it was just——

Q. Did you go over what your testimony was to be or what subject matters were to be covered, before the deposition commenced? A. No.

Q. At no time?

A. No, it wasn't necessary. If the subject ever came up in discussion, I would say the same thing, but——

and L. R. Arnold, secretary-treasurer.

Q. Well, I know, but irrespective of whether it was unnecessary or not, in fact, did you go over your testimony with Mr. Scampini before the deposition? A. No, I did not.

Q. And between the recess—between the hearing on last Thursday and this morning's session, did you discuss your testimony with Mr. Scampini at all?

A. No, I haven't talked with Mr. Scampini since the day I left here, until I came in this morning.

Q. And you didn't discuss your testimony with him? A. No, I didn't.

Mr. Goodman: Suppose we recess for lunch?

(Thereupon an adjournment was taken until 1:15 o'clock P. M., Saturday, September 19th, 1942, and by consent of counsel to be resumed at the same place.)

Saturday, September 19, 1942, 1:15 P. M.

LLOYD R. ARNOLD,

recalled as a witness, having been previously sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Cross Examination

(Resumed)

Mr. Goodman: Shall we resume now?

Mr. Scampini: Yes.

Mr. Goodman: Q. Mr. Arnold, on Thursday you said that—you mentioned the pledge agreement with

(Deposition of Lloyd R. Arnold.)

Mr. McInerney, and Mr. Scampini showed you the so-called pledge agreement and it was identified, whereby certain shares of Merchants Ice & Cold Storage Company were pledged. A. Yes.

Q. To secure a \$50,000.00 obligation. Now, do you recall whether or not that pledge was or was not cleared up in some manner at a later date?

A. That was a pledge of the stock to McInerney. I believe he had a lien on the bank stock too. Well, we—he was later paid off, I believe, and we re-financed that through the bank.

Q. That is what I am trying to get at. It is a fact, is it not, that some later agreement was made with McInerney, by which your obligation to him that was secured by the stock was satisfied by some different type of agreement with him, and that thereupon the shares of stock were pledged to the Pacific National Bank and to the Anglo Bank for loans—— A. The Pacific National Bank.

Q. The Pacific National Bank, I mean.

A. Yes.

Q. And those shares that were the subject matter of this agreement with Mr. Bercut were actually still in pledge at the bank at the time of the making of the agreement with Mr. Bercut, and had to be released, did they not?

A. Yes, that is correct.

Q. The shares of stock of the Merchants, the subject of this Bercut transaction, as we call it, were never at any time in the possession of the

(Deposition of Lloyd R. Arnold.)

Pacific Empire Corporation, were they, in any way, so far as you know?

A. Well, they were pledged to the Pacific Empire Corporation.

Q. Yes, but wasn't that lien of its subsequent to the lien of Mr. McInerney under the pledge agreement?

A. Subsequent to McInerney's?

Q. I mean subordinate to McInerney's.

A. Well, now, I don't know whether they were subordinate or not, but I know this—I will try to answer. When the shares—whether it was subsequent or subordinate to that, I will have to look that up; but when they were in the Pacific National Bank they were behind the corporation note, which I believe was a larger one, and the holding company had a note; they were guarantors on each. I think that was the way it worked.

Q. They both had notes in the bank then?

A. The smaller note I believe was the holding company, and the larger one was the corporation. I believe that is the way it worked.

Q. But at any rate the sum and substance of that was that when the Bercut transaction went through, the arrangements were made with the bank to release the stock that was pledged, and a payment was made to the bank on those obligations?

A. Yes, I went to the bank and obtained the release, yes.

Q. So far as you know, did the Pacific Empire Corporation ever at any time have possession of these shares of Merchants Ice?

(Deposition of Lloyd R. Arnold.)

A. Well, they were pledged. They must have had possession.

Q. Did they actually in some manner have actual possession of the certificates of stock, if you know?

A. Well, I don't know without looking up. I mean that——

Q. Well, how would you find that out?

A. I would have to refer—to get the continuity of our pledges there, I would have to refer to the contract file.

Q. Well, who were the officers of Pacific Empire Corporation?

A. Mr. Maffei was president and Mr. Heer was secretary-treasurer.

Q. Did you have any separate receptacle or box——

A. Yes, we had separate files.

Q. Well, now, how would you know—where would you look to find out whether or not the Pacific Empire Corporation ever had possession of these shares?

A. I would have to look in our collateral folders and our contract file to refresh my memory on that, and then I could probably answer it a little more intelligently.

Q. Without doing that, you can't answer?

A. No, I couldn't answer that now. I would only say that I assume they had possession of it, naturally.

Q. Do you recall whether or not—if it is not a fact that simultaneously with the release of Mr.

(Deposition of Lloyd R. Arnold.)

McInerney's claim or pledge, and in order to accomplish that, whether or not it isn't a fact that the shares were simultaneously pledged with the Pacific National Bank, and in that way the funds were obtained by which the McInerney claim was satisfied and the release from him obtained?

A. Well, yes, that is correct—that is correct.

Q. Now, I believe you testified on Thursday that during the time of your discussions with Mr. Bercut with respect to fixing a price on it, making a deal in connection with the sale of these Merchants shares, that you exchanged opinions with Mr. Heer, who was the secretary—assistant secretary, I believe——

A. He is treasurer, yes.

Q. Treasurer? A. Yes.

Q. Now, did you at the time also exchange opinions with Mr. Webb Richards concerning the matter of this transaction with Mr. Bercut?

A. No, I don't believe I did.

Q. You never discussed it with him at all?

A. I never discussed any details of the transaction with Mr. Richards, no.

Q. Didn't you tell Mr. Richards that you were negotiating with Mr. Bercut?

A. Mr. Richards undoubtedly knew that there were negotiations going on, yes; but as to discussing any details with him, no.

Q. How about Mr. Ryerson? He was an officer of one of your subsidiary companies, wasn't he?

A. Yes, that is correct.

(Deposition of Lloyd R. Arnold.)

Q. Did he know about the pending discussions with Mr. Bercut?

A. He may have known through a conversation with myself that there were negotiations going on, that we hoped would help our position; but as to any details or who it was, I doubt if he knew.

Q. In other words, you didn't discuss with either Mr. Richards or Mr. Ryerson the details of this transaction, any more than you did any other transaction that the officers of the corporation handled? Isn't that right? That is, handled as the executive manager, as it were, of the affairs of the company?

A. Well, we have had an awful lot of transactions where they have been passed upon by the Board, of course, as the minutes show. In this instance, of course, Mr. Ryerson was in Bakersfield, and he had only been a director for about a year, I think.

Q. Now, there were many instances, I find in connection with an examination of the minute books, where you had transactions and consummated them and then reported them to the executive committee or board of directors months later.

A. That happened in some instances.

Q. And so it wasn't anything unusual, was it, that you conducted a business transaction for the corporation without having a prior authorization from the board of directors or the executive committee?

A. Well, on any major transaction, acted on by

and L. R. Arnold, secretary-treasurer.

the executive committee, we generally discussed it with the Board or immediately reported to them.

Q. Now, this was a major transaction, wasn't it, with Mr. Bercut? A. Yes, it was.

Q. Now, did you conceal the fact that you were engaged in this major transaction with Mr. Bercut from the other directors of the company?

A. No, we didn't conceal it.

Q. Did you deliberately and with plan aforethought enter into this transaction with Mr. Bercut with the idea in mind of not advising the board of directors concerning the transaction? A. No.

Q. Well, why was it, then, that you made the transaction at that time without getting, let us say, the prior authority of the board of directors?

A. The only answer I can give to that is that the conditions and everything were becoming quite hectic at the time, and in our opinion some sort of a transaction should be worked out that would be profitable to both companies.

Q. Now, these discussions with Mr. Bercut extended over a period of about sixty days, I think you said? A. I believe that was it.

Q. Now, during all that period of time you and Mr. Maffei did not consult, outside of Mr. Heer, with any of the other directors concerning this matter?

A. No, we worked it out, what we thought was in our best interests. We did it.

Q. Now, did you intend to ask the approval of the board of directors?

(Deposition of Lloyd R. Arnold.)

A. Well, we certainly were not concealing it. I presume we did.

Q. You didn't have in mind the fact that you weren't—I will put it this way: Did you intend deliberately not to present this matter to the board of directors? A. No.

Q. Neither you nor Mr. Maffei?

A. I certainly don't believe Mr. Maffei did. I know I didn't.

Q. And you didn't?

A. I didn't do it with any deliberate intent and purpose, no.

Q. And did you act, in making this transaction with Mr. Bercut, in the utmost of good faith so far as the affairs—so far as your representation of the holding company was concerned?

Mr. Scampini: Isn't that asking for the conclusion of the witness?

Mr. Goodman: Well, it might.

A. I certainly believed I was acting in good faith. There was no secret.

Q. And you felt that you were doing the best job that you could for the holding company?

A. I had no other interest but doing the best job I could, whatever it was.

Q. And that is what you felt that you were doing at the time, Mr. Arnold?

A. As the circumstances existed, I could only act along what I thought was the best interests of the corporation.

(Deposition of Lloyd R. Arnold.)

Q. And from your own knowledge, do you think that that was the view—do you know, rather, that that was the view that Mr. Maffei held at the time, as a result of your discussions with Mr. Maffei?

A. Well, yes.

Q. Now, Mr. Scampini asked you this morning whether Mr. Bercut had asked you to call a meeting of the board of directors with respect to this matter.

A. Yes.

Q. And you said he did not.

A. No, not that I recall, I believe I said.

Q. Did you have any discussion with Mr. Bercut with respect to the holding of a board of directors' meeting of the company?

A. No, I believe I have already answered that; I don't remember any such discussion.

Q. You never had any such discussion?

A. No, I don't recall.

Q. Did Mr. Bercut make any comment upon the matter to you at all as to whether there should be a directors' meeting?

A. Well, I don't recall any such conversation.

Q. Who prepared the agreement of January 8th, 1941—the contract?

A. That letter of agreement was—I am sure I dictated that. I think I dictated that right in my own office.

Q. And after you had prepared it, you signed it as the secretary, did you not?

A. As secretary, yes.

(Deposition of Lloyd R. Arnold.)

Q. And Mr. Maffei signed it as the president?

A. That is correct.

Q. And you put on the corporate seal, didn't you?

A. I did.

Q. And then did you deliver it personally to Mr. Bercut, or did you mail it to him, do you recall?

A. No, I delivered it to Mr. Bercut.

Q. Personally?

A. I mean right in our office there.

Q. Right in your office?

A. Yes. I don't think I went over to his office. It was right there.

Q. Now, from the time of that agreement of January 8th, 1941, to August 20th, 1942, I believe you stated that there were no directors' meetings of the company ever held?

A. That is correct.

Q. And you continued during that period of time from January 8th, 1941, up to August 20th, 1942, to act as the secretary and manager of the business affairs of the company, did you not?

A. I continued in the same capacity.

Q. Yes. And you continued, whenever it was necessary, to consult with Mr. Maffei, the president of the company?

A. Naturally.

Q. You had discussions with him?

A. Yes, naturally.

Q. Did you consult with the counsel for the— with any counsel for the company at the time you entered into the agreement of January 8th, 1941?

A. No, I did not. It ended up in purely a sale, —that is all.

(Deposition of Lloyd R. Arnold.)

Q. Are your relations with Mr. Maffei at the present time harmonious?

A. Oh, yes indeed.

Q. There is no conflict between you?

A. None whatsoever.

Q. Have any threats been made to you with respect to this transaction? A. Threats?

Q. Yes, against you with respect to your testifying on behalf of the plaintiffs in this action?

A. No, none whatsoever.

Q. None whatsoever?

A. No, none whatsoever.

Q. At the time of the transaction of January 8th, 1941, did you intend—did you have an honest, good faith intention, in executing the agreement of January 8th, 1941, to transfer the corporation's shares for the consideration named therein to Ber-cut? A. I mostly certainly did.

Q. And did you consider at that time, as a trustee and officer of the corporation, that the deal was in all respects fair and proper?

A. I believe I have answered that before.

Q. Well, did you?

A. I certainly felt that it was fair under the circumstances that existed then, yes.

Q. And did you feel that you were making a proper and good faith transaction on the part of the company that you represented?

A. I was doing the very best I could.

(Deposition of Lloyd R. Arnold.)

Q. Just answer it "Yes" or "No." Just read it again, Mr. Reporter.

(Pending question read.)

A. Oh, yes.

Q. Did you receive any consideration from any one for making the transaction, other than the consideration that is recited in that agreement of January 8th, 1941?

A. Most certainly and positively not.

Q. And did you receive any promises of any kind?

A. None whatsoever.

Q. From any one, to give you any consideration?

A. Not one fraction of a cent.

Q. So far as you know, did Mr. Maffei receive any such consideration?

A. So far as I know, he most certainly didn't. Whether I knew or not, he didn't.

Q. And from your conversations and discussions with Mr. Maffei, would you say that at the time this transaction was entered into he believed that the transaction was entirely fair and proper?

A. He most certainly believed, as I did, that it was fair under the circumstances. We weren't happy over it, naturally.

Q. Did you enter into this transaction for and on behalf of the corporation with Mr. Bercut because of any compulsion on the part of Mr. Bercut?

A. I have already stated that I probably initiated the discussions. The only friendly contact that we had that was close to the picture was Mr. Bercut, and that is why I went to him.

(Deposition of Lloyd R. Arnold.)

Q. Because of the fact—I will put it this way: Is it a fair statement to say that because of the relationship which existed between you and Mr. Maffei and Mr. Bercut as a result of your connections in the two companies, and because of his standing in the business world and financial ability, that this transaction was consummated?

A. I will try to qualify the answer considerably, that, as I have said before, Mr. Bercut represented certain things that we didn't have—financial ability and credit.

Q. And there was no place else that you could go to, so far as you could see at that time, to get the means whereby you could keep these companies going? Is that right?

A. When we had reached that point, without just shopping around, as I said, we went to some one who was connected with us and was friendly and had the things that I have just mentioned. We were trying to find a solution of our problems at the same time—both problems.

Q. Now, it is stated in the complaint in this case that the Pacific Empire Holdings Company has aggregate liabilities, at the time of the filing of the complaint, in excess of \$250,000.00. Now, who are the chief creditors of the holding company?

A. Well, the chief creditors of the holding company are the Pacific Empire Corporation—that's the largest one; that is some \$160,000.00 or so. There is also about \$70,000.00 owing to myself as liquidating agent of the City National Bank.

(Deposition of Lloyd R. Arnold.)

Q. You mean that there is an indebtedness to the City National Bank? A. Liquidating.

Q. And you have been liquidating that company? A. Yes.

Q. In your official capacity as liquidating agent of the City National Bank there were some moneys owing you—is that it? A. That is right.

Q. And who else?

A. Well, Edward Molkenbuhr, an attorney, \$2400.00 or a couple of thousand, or something like that; and Kohler & Chase; Ellis & Hubner,—

Q. The attorneys?

A. The attorneys. The Corporation Trust Company a couple of thousand dollars; and miscellaneous small items and trade credits, I guess around a thousand dollars or so; Mr. Scampini four or five hundred dollars.

Q. Well, you haven't got many in regard to the number, then. It is the large amounts, is it?

A. It is the large amounts.

Mr. Scampini: The California Pacific Service—do you remember that?

A. Oh, I beg your pardon. California Pacific Service, yes.

Mr. Goodman: Q. What company is that?

A. That is the laundry company.

Q. The laundry company?

A. That is small—fifteen hundred dollars, somewhere along there.

Q. And there are some small miscellaneous trade creditors?

(Deposition of Lloyd R. Arnold.)

A. Yes, about a thousand dollars—something like that.

Q. Scattered around here in San Francisco?

A. Yes, that is local—all small.

Q. Telephone Company?

A. Well, it is still owing, I guess.

Mr. Scampini: See if that will refresh your memory. (Handing paper to the witness.)

A. Well, I think I have just about got them now. Yes, eleven hundred in the Pacific National Bank; thirty-eight hundred to Henry Bercut.

Mr. Goodman: Q. Henry Bercut? A. Yes.

Q. What was that?

Mr. Scampini: Will you excuse me a moment?

(Short recess.)

Mr. Goodman: Q. Any other substantial sums?

A. About \$600.00 worth of franchise taxes; Merchants Ice & Cold Storage Company, twenty-five thousand.

Q. Is that a list of the creditors of the company there?

A. Well, that is not exactly—it is just about a list, yes. The smaller ones are consolidated on here.

Mr. Goodman: Is there any objection to having that attached to the deposition?

Mr. Scampini: No.

Mr. Goodman: Well, then, let this be marked as an exhibit, this document which the witness has just referred to—let it be marked for identification.

(Said document marked “‘Defendants’ Exhibit for identification.’”)

(Deposition of Lloyd R. Arnold.)

Q. Now, you stated in your direct examination that when you originally—when you started the discussions with Mr. Bercut, that you had at first in mind that you would sell only a part interest of the holding company in the Merchants stock?

A. That is correct.

Q. And keep a minority interest?

A. That is correct.

Q. And that subsequently that idea was abandoned, when you decided to sell all of the stock, when you finally arrived at the price of \$35,000.00. Now, you did reserve, however, the right to retain a minority interest in the stock, did you not?

A. A right to retain?

Q. Yes. Didn't you include in the agreement for that purpose an option to repurchase within five years 20,000 shares—within two years 20,000 shares at 50¢ a share?

A. That was somewhat different from our original plan. After we arrived at the conclusion of the deal, we got the option to buy 20,000 shares, which would be 50¢ a share, yes. That wasn't the original plan, of course.

Q. Yes. So that you could have retained the minority interest by exercising that option at any time within two years?

A. If we were able to exercise it, yes, that is correct.

Q. It is the same thing in the long run as reducing the price and selling a smaller amount of stock arithmetically, isn't it?

A. Well—

(Deposition of Lloyd R. Arnold.)

A. Yes, about a thousand dollars—something like that.

Q. Scattered around here in San Francisco?

A. Yes, that is local—all small.

Q. Telephone Company?

A. Well, it is still owing, I guess.

Mr. Scampini: See if that will refresh your memory. (Handing paper to the witness.)

A. Well, I think I have just about got them now. Yes, eleven hundred in the Pacific National Bank; thirty-eight hundred to Henry Bercut.

Mr. Goodman: Q. Henry Bercut? A. Yes.

Q. What was that?

Mr. Scampini: Will you excuse me a moment?

(Short recess.)

Mr. Goodman: Q. Any other substantial sums?

A. About \$600.00 worth of franchise taxes; Merchants Ice & Cold Storage Company, twenty-five thousand.

Q. Is that a list of the creditors of the company there?

A. Well, that is not exactly—it is just about a list, yes. The smaller ones are consolidated on here.

Mr. Goodman: Is there any objection to having that attached to the deposition?

Mr. Scampini: No.

Mr. Goodman: Well, then, let this be marked as an exhibit, this document which the witness has just referred to—let it be marked for identification.

(Said document marked “Defendants’ Exhibit for identification.”)

(Deposition of Lloyd R. Arnold.)

Q. Now, you stated in your direct examination that when you originally—when you started the discussions with Mr. Bercut, that you had at first in mind that you would sell only a part interest of the holding company in the Merchants stock?

A. That is correct.

Q. And keep a minority interest?

A. That is correct.

Q. And that subsequently that idea was abandoned, when you decided to sell all of the stock, when you finally arrived at the price of \$35,000.00. Now, you did reserve, however, the right to retain a minority interest in the stock, did you not?

A. A right to retain?

Q. Yes. Didn't you include in the agreement for that purpose an option to repurchase within five years 20,000 shares—within two years 20,000 shares at 50¢ a share?

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Q. Yes. So that you could have retained the minority interest by exercising that option at any time within two years?

A. If we were able to exercise it, yes, that is correct.

Q. It is the same thing in the long run as reducing the price and selling a smaller amount of stock arithmetically, isn't it?

A. Well—

(Deposition of Lloyd R. Arnold.)

Q. In other words, it would be the same thing as if, instead of selling 78,000 shares of stock, you were selling 58,000 shares of stock for \$10,000.00 less?

A. Well, if we were positive of being able to exercise it. That is the difference, of course.

Q. Well, I am only asking you this question in connection with your statement that you wanted to retain a minority interest.

A. Yes, that is correct.

Q. Now, at the time of the—strike that out. In your testimony on Thursday you stated that you first—you started with the figure of \$50,000.00 in discussing the matter with Mr. Bercut, and then on further examination this morning by Mr. Scampini you said that you had in mind—I think that was the words you used—\$75,000.00 to start with. Did you ever discuss the figure of \$75,000.00 with Mr. Bercut?

A. I thought we started at seventy-five—fifty or seventy-five thousand dollars.

Q. Well, as I said, in your direct examination on Thursday you started with \$50,000.00, and the first time that the figure \$75,000.00 was mentioned was in the examination this morning. Now, I would like for you to clear that up and advise me whether or not you ever discussed with Mr. Bercut any figure higher than \$50,000.00—irrespective of what you and Mr. Maffei may have had in mind.

A. Yes. Regardless of what I said—in our first

(Deposition of Lloyd R. Arnold.) -

discussion that was my thought, and we started out with seventy-five.

Q. Are you sure about that?

A. I know that was the basis I was using in discussing it with Mr. Gaither here. He was trying to interest some one. I thought we started out at—now, I can't—

Q. Well, are you sure?

A. Well, I have—

Q. Are you positive that that figure was the figure that you started out the negotiations with Mr. Bercut?

A. I think the first time that we started to talk, which was very casual, it was more or less to get Mr. Bercut's interest—I thought I discussed seventy-five thousand.

Q. Well, then, if you stated in the examination on Thursday that the starting figure was \$50,000.00, are you desirous of changing that, or is your recollection just not clear on it?

A. I didn't mean to change it—either way. That is why I began this that way. If I stated that as a definite statement, that it was fifty—I am trying to refresh my memory. I had had conversations over here at the bank at around seventy-five thousand, and I thought I probably started out the same way with Mr. Bercut. Now, I can't—

Q. At the time of the negotiations with Mr. Bercut—I will strike that out. You spoke of a lapse in the negotiations with Mr. Bercut.

(Deposition of Lloyd R. Arnold.)

A. Yes.

Q. Do you recall? A. Yes, I do.

Q. And correct me if I am incorrect in paraphrasing your statement—— A. Yes.

Q. (Continuing:) ——you stated that Mr. Bercut abandoned or quit the negotiations and went away, and then they were resumed?

A. Well, I don't believe that I said that he abandoned them, but he went away at the time on some vacation trip, I believe.

Q. Well, it was some fact, it was some matter that came up that you discussed that caused him to say he wanted to look into it further? Wasn't there something to that effect?

A. Well, I think what you refer to is when he came back and we had some more meetings, and then he expressed that he was—well, he practically turned it down.

Q. Yes. Now, what was the factor that caused that?

A. Well, the factor that caused that, that created some uncertainty, was a loss which we hadn't realized, but it was threatened. Now, I mean the Merchants Ice & Cold Storage Company.

Q. What loss?

A. One of the customers—what they called Bennett & Layton; they were customers of the Merchants.

Q. Is what you are referring to there the following, namely, that the Bank of America——

A. Yes, that is it.

(Deposition of Lloyd R. Arnold.)

Q. (Continuing:) —was asserting a claim of some forty thousand dollars for collusion——

A. Releasing.

Q. (Continuing:) —in the abstraction and releasing of butter——

A. That is right.

Q. (Continuing:) —upon which the bank claimed to have warehouse receipts?

A. That is right.

Q. And when that matter was called to the attention of Mr. Bercut, he said that he didn't want to go through with it until he went into it further, or something of that sort?

A. Well, he wanted to go into it farther, yes.

Q. So that at the time of the consummation of the transaction with Mr. Bercut, in addition to the other matters that you have referred to with respect to the financial condition of the Merchants Ice, there was a pending claim of some forty thousand dollars on the part of the Bank of America, wasn't there?

A. That was on account of this collusion between the employees of Merchants and Bennett & Layton. The butter was removed without a release.

Q. By Bennett & Layton? A. Yes.

Q. Now, besides that, another matter that was pressing was the claim of the Gas & Electric Company for unpaid bills and their threat to cut off the gas and electricity; and likewise in the case of the Telephone Company?

A. Well, the Power Company wasn't anything new; I mean that I had that trouble all the time I had been down there.

and L. R. Arnold, secretary-treasurer.

Q. And wasn't the Telephone Company pressing too for a payment of their bill, and threatened to cut off service at that time?

A. Well, now, I don't recall about the Telephone Company, but I do about the Power Company. When I went into the Merchants, it was away up to a pretty large figure, and we cut it down to less than half, I guess, but then we were still having trouble with it—a lot of trouble.

Q. Wasn't it urged at one of the directors' meetings of the Merchants Ice at or about the time of your negotiations with Mr. Bercut, by some of the directors, that Mr. Bercut be asked to take over the leadership of the Merchants Ice & Cold Storage Company?

A. Well, not some of the directors. One director asked that question—made that suggestion. That is correct, yes.

Q. Was there any discussion in one of the meetings——

A. Pardon?

Q. Was there any discussion in one of the meetings of the Merchants Ice—directors' meetings of the Merchants Ice?

A. Well, this director made the statement or suggestion before the Board, while the Board was in session. The directors commented on it, but it was—well, it wasn't in any way acted upon. I think Mr. Bercut declined at the time. I don't know. There was nothing formal about it.

Q. Did you consider it—strike that out. At the

(Deposition of Lloyd R. Arnold.)

time that you concluded the transaction with Mr. Bercut did you have in mind calling a directors' meeting of the holding company?

A. I may have had it in mind; I don't know, but——

Q. Well, is there any reason that you didn't call a meeting of the directors?

A. I couldn't give you any real reason why we didn't, no.

Q. I mean you didn't have any plan in mind for not calling a meeting, did you?

A. No. We certainly had no plan. We weren't going to do that.

Q. Now, in addition to the matters that I have asked you about as to the financial condition of the Merchants Ice at the time of the transaction with Mr. Bercut, there was another matter that was very pressing, too, wasn't there? Wasn't there a substantial overdraft in the bank account?

A. Well, not a substantial overdraft. There was—I think the only time that we were overdrawn at the bank was—I will try to explain it in this way: In other words, the legal borrowing limit with the bank, because of our other loan, was cut down, and we had operated by using the medium of trade acceptances upon concerns whom we could obtain them from, to make up our direct borrowings, and then discounting those at the bank, and then we arranged for some outside financing with a finance company here that was friendly to the bank. We

(Deposition of Lloyd R. Arnold.)

had no way of keeping down below their limits, and at one time we had to—we were right up to the limit, and instead of loaning they carried the overdraft; in other words, we always had that ceiling that we had to keep under.

Q. Did you know as a matter of fact that there was an overdraft of approximately \$8,000.00 at the time of the conclusion of this transaction on January 8th, 1941, with Mr. Bercut?

A. I didn't think it was that large. I thought it was three or four thousand dollars. This is on a particular day that I recall; it happened to be a payroll day, too.

Q. It was many, many years since there had ever been a dividend on the preferred stock of the Merchants? A. Yes, many years.

Q. How many years?

A. Well, I think the records show it was since 1927—yes, 1927, I think was the date. It was a cumulative stock—preferred stock.

Q. Were there many stockholders of the Pacific Empire Holdings Company?

A. Oh, I'd say somewhere about—somewhere about 8,000, I guess.

Q. And who sold that? Did you have an underwriter that sold that stock?

A. Well, I don't think you would call it an underwriter. All the stock was sold by a brokerage firm.

Q. What was the name of the brokerage firm?

(Deposition of Lloyd R. Arnold.)

A. That was Frederick Vincent & Company. That was before my time.

Q. At the time of your negotiations with Mr. Bercut, aside from Mr. Gaither of the bank—of the Pacific National Bank—can you name any other individual, firm or corporation whom you had in mind or to whom you could have gone in order to dispose of the stock of the Merchants Ice and get the new management for it?

A. I had no one in mind that I knew we could definitely do that, no. Is that your question?

Q. After the transaction was consummated with Mr. Bercut—strike that out. I will reframe it this way: After the consummation of the transaction with Mr. Bercut, did you ever discuss the transaction with Mr. Webb Richards, one of the directors?

A. I discussed it with Mr. Richards, that it was—that the deal was—that we had been working on was concluded. I don't believe that I ever told him the details of it.

Q. Did you have any reason for not telling him the details?

A. No reason, other than the fact that we didn't like to tell the world that we had lost our main asset, you might say.

Q. Well, he was a director of the company?

A. He was a director, yes. As I have stated before, he knew that there were negotiations going on.

Q. And he knew that the stock had been sold, didn't he, Mr. Arnold? A. Yes.

(Deposition of Lloyd R. Arnold.)

Q. Is that true in the case of Mr. Ryerson, too?

A. I don't believe that either of them knew that all the stock was sold, no.

Q. Well, they knew of the transaction with Mr. Bercut?

A. They knew that the transaction that we were negotiating had been concluded, yes.

Q. And how about the gentleman from down across the bay, the farmer Giachino?

A. Giachino—I don't believe that I have had any conversation with him at all since that time.

Q. How soon after the consummation of the transaction did both Ryerson and Webb Richards know that the deal had been consummated? Very shortly thereafter?

A. I will have to answer that this way: That we were trying to get the Frostcraft Corporation going, and needed capital. We had been drawing pretty heavily on the laundry, and I think the laundry wanted some extra cash, and I had told them that we were working on a transaction that we hoped—if it worked out, why, it would do the things that we were trying to do. That was the same as I have mentioned here.

Q. Now, the company owed—the holding company owed some money to the Merchants Ice at the time of this transaction, did they not?

A. That is correct.

Q. You didn't quite answer my question, Mr. Arnold, as to how soon after the transaction you

(Deposition of Lloyd R. Arnold.)

informed Ryerson and Webb Richards that the deal had been consummated.

A. Well, I don't know exactly. I know that we—I must have told Mr. Richards reasonably soon thereafter—I can't tell you when; but Mr. Ryerson was away, and I probably didn't tell him until next time I saw him.

Q. Well, in either or both events, is it fair to say that it was within a month or two afterwards, at the latest?

A. Oh, I would say a couple of months probably, yes.

Q. Did any director of the company ever request a meeting of the board of directors for the purpose of taking any action with respect to the Bercut transaction?

A. Not that I know of—at least not to me.

Q. Not to you. Now, what is your best knowledge as to the market for the Merchants Ice & Cold Storage Company preferred stock at the time of this transaction?

A. The best price—you mean market price?

Q. Market price.

A. The only price that I know would be a small lot price with unlisted brokers, or a broker specializing in unlisted securities. I guess the preferred stock—I have seen it as high as two and a half, two seventy-five.

Q. No, I mean in January, 1941.

A. Well, that would be according to whatever

and L. R. Arnold, secretary-treasurer.

the last sale was around then. I am frank to say I don't know what the published price was.

Q. Do you know whether or not Mr. Maffei made a sale of stock at around 50¢ a share around, or shortly after January, 1941?

A. I don't recall anything. If he did, he didn't mention it to me, I don't think. You mean some of his personal holdings?

Q. Yes. You didn't hear about it, did you?

A. No, I don't recall of any, I don't believe, no—not unless he could have mentioned it to me and I didn't pay any attention to it. It wasn't anything that the company had anything to do with.

Q. It is alleged in this complaint that these shares of stock had a value of over half a million dollars at the time of the transaction with Mr. Ber-cut?

A. Yes.

Q. Did you consider that that was a fair value for this stock at that time?

A. The value that we speak of, of course, was supposed to be—it is a fair book value of that stock of that corporation. It is an accountant's valuation of it. It is not a market value, I don't assume, but——

Q. Well, what would you say was the fair market value of the stock at that time? You were president of one company and secretary of the other, and unquestionably kept in touch with brokers.

A. Well, I know, naturally, what—or in the neighborhood of what the market price was in small

(Deposition of Lloyd R. Arnold.)

lots of preferred or common stock, which I have commented on here.

Q. How about the common stock? What would you say was the fair market value at the time——

A. Are you just talking about individual shares or what? On an unlisted stock, what I am getting at is that there is no—there is no fair market value, I mean——

Q. Do you think you could have gotten anybody at that time—have you ever heard of anybody that would pay as much as 50¢ a share for the common shares in January, 1941?

A. Not to go out in the market and pick it up, no.

Q. And what would you say was—what in your opinion was the book value of the stock at that time?

A. Well, the book value of a stock—it would not be my opinion or anybody else's. It would be different—I mean it has to be——

Q. You mean just according to——

A. Just according to your net worth after setting aside your liabilities and finding the valuation of the physical properties that are on the books.

Q. Well, in January, 1941, you were president of Merchants Ice and secretary and manager of the affairs of this holding company——

Mr. Scampini: Now, just a moment. There is no evidence that he was manager of this company.

Mr. Goodman: Oh, yes, he has testified to it.

and L. R. Arnold, secretary-treasurer.

Mr. Scampini: No. He was president and secretary——

Mr. Goodman: Well, let's not argue about it.

Mr. Scampini: Well, let's not assume something that is not in evidence either. That is a conclusion.

Mr. Goodman: Q. From your familiarity with both companies, is it a true statement to say that the fair value of this stock was as much as a half million dollars?

Mr. Scampini: By "this stock" you mean the whole 78,000 shares, Mr. Goodman?

Mr. Goodman: Yes, 78,000 shares.

A. I will have to answer that this way: Every act on behalf of the holding company to protect that investment over a period of years has been based upon the belief that we believed in that value and its potential value; otherwise we would not have been liquidating other assets to preserve it. The control of a company of that size is a value that has no relation whatever to the market price on its stock, unless it were presumably an active listed stock, I would assume, on a regular stock exchange.

Q. Well, if you thought the stock was worth a half million dollars, you wouldn't have sold it for thirty-five thousand?

A. Well, we most certainly would not have sold the stock for thirty-five thousand if we could have—in other words, everything that we considered was its potential value and its value to that corporation, and it was certainly worth lots more than thirty-five thousand.

(Deposition of Lloyd R. Arnold.)

Q. You couldn't get anybody to buy it for that, of course?

A. At what figure? The half million, you mean?

Q. Oh, yes, or any figure any such size as that.

A. I had not been able to.

Q. Now, you don't want to put yourself—or do you want to put yourself on record here as attaching any real value to the stock of this corporation, which had been in great difficulties over all these years and that had been milked by its officers and directors and huge sums taken from it over many years until it was on the verge of complete collapse in January, 1941—you don't want to put yourself on record with respect to the stock of that corporation as having any real value at that time, do you?

A. Well, yes, I do.

Q. Oh, you do? A. Yes.

Q. And that is the reason why you sold it for \$35,000.00 to Mr. Bercut?

A. No, no, that isn't the reason.

Q. Well, what pressing demand was it—

A. Let's put it this way—

Q. What pressing demand on the holding company was there? Why did the holding company want to sell this stock at that time?

A. Well, our major asset was in a position of being—give me that question again.

Q. I say what pressing demand was there against the holding company in January of 1941 that made it essential that you sell the stock of the holding company?

(Deposition of Lloyd R. Arnold.)

Mr. Scampini: Of the holding company?

Mr. Goodman: Q. To sell the stock of the Merchants Ice Company.

A. Well, it was the combination of reasons that I have already given here.

Q. Well, wasn't the main reason why you sold the stock, to get the Merchants Ice rehabilitated?

A. In order to protect the investment of the holding company—that was it, yes.

Q. And if there was no——

A. That was the main thing.

Q. And there was no demand on the part of any one against the holding company which made it necessary for you to sell the stock of Merchants Ice, was there?

A. No, we had plenty of obligations, but that wasn't——

Q. Well, in so far as those obligations were concerned, any one of the creditors could have put you into bankruptcy, couldn't they, and have sold out your assets? You weren't doing the holding company in that sense any particular constructive good, were you, by selling the stock?

Mr. Scampini: Aren't we engaged in a debate?

Mr. Goodman: Well, I suppose so—maybe so. I think your criticism is justified; but let me ask just one more question on that subject.

Q. The main purpose of making this transaction with Mr. Bereut, Mr. Arnold, was to bring about the rehabilitation of the Merchants Ice & Cold Storage Company? Wasn't that it?

(Deposition of Lloyd R. Arnold.)

A. Yes. I would like to qualify that, though, in this way. Bear in mind that our negotiations, as I said before, that we had centered our whole program on developing the Merchants, and in initiating these conversations it was for the purpose of doing the things that I have already stated here—bringing in money and credit to rehabilitate the Merchants; likewise to help ourselves, because we had hoped to have participation in that, but when we ended up on our transaction we didn't have it.

Q. But if you sold your stock you didn't have any further participation in Merchants Ice, did you?

A. Not unless we could have exercised the option there.

Q. Now, in addition to the service that that did to the Merchants Ice—the making of this deal—it was also very important for the holding company to make it for another reason, wasn't it, besides any claims or demands or obligations of the holding company?

A. I don't get what you mean.

Q. I will reframe that question. To sum up: Your object in making the deal with Mr. Bercut was to bring about not only, as you put it, the rehabilitation of the Merchants Ice, but having in mind all the factors that you have described, the saving of the holding company as well?

A. Yes, that is correct.

Mr. Goodman: I would like to have the minute books offered in evidence on this deposition as a part of the deposition.

(Deposition of Lloyd R. Arnold.)

Mr. Scampini: All right. Let them be deemed read, and we can read from the books.

Mr. Goodman: It may be stipulated that the four minute books which have already been offered for identification, as well as the account books——

Mr. Scampini: I am perfectly willing to offer them. Of course, I couldn't offer them yet.

Mr. Goodman: That is right. Let's make the stipulation this way: It may be stipulated that the four minute books that have been offered for identification may be considered as introduced in evidence, or admitted in evidence, and that the books may remain in the custody of Mr. Scampini, with either side having the right to access to them.

Mr. Scampini: That is so stipulated. This is off record.

(Discussion off record.)

Mr. Scampini: Let the stipulation run, that the current records of Pacific Empire Holdings and the general ledger and journal of said corporation which have been offered heretofore as plaintiffs' exhibits, whatever they were, for identification, may also be retained in the custody of Mr. Scampini, but that either side may have access to them and examine them at all reasonable times.

Mr. Goodman: Just one or two more questions and then I will be through.

Q. You stated in your direct examination on Thursday that you caused the election, or, rather, the holding company caused the election of Mr. Bercut as a director of the Pacific National Bank?

A. Yes.

(Deposition of Lloyd R. Arnold.)

Q. Now, do you or do you not know whether Mr. Bercut had acquired some stock in his own name in the Pacific National Bank?

A. Well, he may have acquired some, but——

Q. Prior to or at the time——

A. Yes, I think that he did, now that you mention it; but what I meant to say is that Mr. Maffei and myself had the discussions with Mr. Gaither about Mr. Bercut as a new director there.

Mr. Goodman: That is all.

Redirect Examination

Mr. Scampini: Q. Now, Mr. Arnold, Mr. Goodman asked you what pressing obligation did the holding company have which compelled it to, or was sufficient in and of itself to compel you to make this deal with Mr. Bercut; and I am now asking you, isn't it a fact that the compelling obligation which finally prompted you to make this deal with Mr. Bercut was the necessity of obtaining \$25,000.00 for the purpose of repaying that amount to the Merchants Ice & Cold Storage Company?

A. That was part, yes. In other words, the basis of our original discussions—it was to pay that off and remedy the entire thing at once and rehabilitate the Merchants.

Q. Now, by "rehabilitate the Merchants," do you mean that you had to pay to the Merchants \$25,000.00?

A. At least that.

Q. Well, was that what you paid to the Merchants as a result of this transaction?

(Deposition of Lloyd R. Arnold.)

A. That is right.

Q. Was that in repayment of certain moneys which the holding corporation had borrowed from the Merchants? A. That is correct.

Q. And is that what you meant by "rehabilitate the Merchants"?

A. That would go a long ways toward that, yes.

Q. Well, did you do anything else as a result of this transaction which would have any bearing upon the rehabilitation of the Merchants?

A. On that one transaction, you mean?

Q. Yes.

A. The only thing that *would out* of the proceeds of that would be the \$25,000.00 that we paid to the Merchants.

Q. Then what else did the holding company do that had for its purpose the rehabilitation of the Merchants, as a result of this transaction? What else other than paying to the Merchants \$25,000.00 from the consideration received from the sale of the stock?

A. We ourselves didn't do anything, because we parted with our interest.

Q. What was the holding company going to do looking towards the rehabilitation of the Merchants as a result of this transactiion?

A. I don't get your question.

Q. That is a very simple question, isn't it?

A. We wanted to pay off some obligations.

Q. To whom?

(Deposition of Lloyd R. Arnold.)

A. We reduced our bank loan five thousand.

Q. All right. And what else?

A. And I think all of their charges, trust charges and interest, which was delinquent, was about—that ran it up to about eight thousand. We paid the landlord some money. I don't recall just what it was.

Q. What else did the holding company get as a result of this transaction?

A. It got nothing else other than the thirty-five thousand.

Q. Did you ameliorate the condition of the holding company as a result of this transaction? Did you improve it any? A. Very little.

Q. Did you improve it any at all?

A. Well, now, wait a minute—as a result of this transaction we naturally did not improve it, no.

Q. Well, as a result of this transaction you lost an asset? A. That is right.

Q. Which was carried on the books of the corporation at cost, wasn't it?

A. That is right.

Q. In excess of half a million, wasn't it?

A. We carried it on our books in excess of half a million dollars.

Q. Was that what it cost the holding company throughout this period of years—this block of stock?

A. I think if we added everything up, it probably would cost that.

Q. Yes. As a result of this transaction you got

(Deposition of Lloyd R. Arnold.)

\$35,000.00, of which \$25,000.00 was paid right back into the Merchants Ice & Cold Storage Company?

A. That is correct.

Q. And the other \$10,000.00 was kept clear by the holding company—is that right?

A. That is right.

Q. And you were minus the half million dollars?

A. We were minus the investment, yes.

Q. Now, what would the transaction have accomplished with respect to rehabilitating the Merchants—what did it accomplish in that respect?

A. We no longer had any interest in the Merchants, so as an investment it didn't accomplish anything for us.

Q. I am asking you now, what did it accomplish in regard to rehabilitating the Merchants, which you say you had in mind as a motive for making the transaction?

A. I will have to go back to our original discussions—that we had hoped to associate ourselves with some one—in this instance Mr. Bercut—who could lend it or give it the things like credit and capital which it needed—working capital which we didn't have. We did want to maintain a position, which we did not expect to be a majority, but it was probably going to be a minority. That was the basis of all our discussions, yes.

Q. By "minority", do you mean just a little bit less than half of 78,000 shares? Is that what you mean?

(Deposition of Lloyd R. Arnold.)

A. I would say a little less than half, yes.

Q. Now, I will ask you again, what bearing did this transaction have with respect to the objective of rehabilitating the Merchants Ice & Cold Storage Company? What did it do in that respect?

A. As a result of that deal it did those things, but we didn't participate.

Q. Well, who did? A. Mr. Bercut did.

Q. Mr. Bercut. You mean the new management?

A. The new management, yes.

Q. All right. Now, could you not have appointed a new management of Merchants Ice & Cold Storage Company without selling the stock?

A. If we had the ones who were willing to do that.

Q. Well, answer my question "Yes" or "No."

A. I could have appointed them.

Q. Yes. A. If I knew who could do that.

Q. Now, did you ever—Mr. Bercut at that time was a director of the Merchants Ice & Cold Storage Company, was he? A. That is correct.

Q. And he was elected to that office by the stock that the holding company owned—is that correct?

A. That is right.

Q. And at one of the meetings I understand you to say one of the directors—I don't know who—

A. Mr. Schinneller, I believe.

Q. (Continuing): —Mr. Schinneller suggested that you should resign? A. Yes.

(Deposition of Lloyd R. Arnold.)

Q. And Mr. Bercut should be president—didn't he?
A. Yes, that is right.

Q. Why didn't you resign?

A. I don't believe that we had started our conversations with Mr. Bercut yet.

Q. I am asking you why you couldn't have appointed Mr. Bercut president of the Merchants Ice & Cold Storage Company?

A. I believe Mr. Bercut declined that day.

Q. Did you ever offer to appoint him president?

A. After that subject came up, I think we asked Mr. Bercut how about it.

Q. And what did he say?

A. I think he declined.

Q. Did you approach him with respect to the negotiations with the idea in mind of changing the management of the Merchants Ice & Cold Storage Company as part of the transaction?
A. Yes.

Q. Did you suggest to him that if he bought a majority of the stock you would resign and he could become the president and general manager of the Merchants Ice & Cold Storage Company?

A. Yes.

Q. What did he say to that?

A. Well, he was agreeable to it.

Q. Why didn't you do it? Why didn't you resign and appoint him president?

A. Well, I thought you were discussing this transaction that we worked out with him.

Q. Well, I am talking about the beginning of

(Deposition of Lloyd R. Arnold.)

the transaction, where you offered a partnership situation.

A. Oh, that is what I am talking about. Well, as our discussions got farther along we couldn't arrive at any agreement at the basis that we had started out on, which was, to wit, to associate ourselves—in other words, step into a minority position and have Mr. Bercut take the majority position and——

Q. Well, why couldn't you arrive at it?

A. Mr. Bercut wasn't agreeable to put up the money that we wanted.

Q. How much money did you want?

A. Well, we started out with seventy-five thousand.

Q. For half the stock that you owned—is that right?

A. That was the basis of our conversation.

Q. Did you consider that to be a fair value of such a block of stock?

A. I thought it was a fair approach in starting to accomplish the things that we were attempting to do.

Q. Would you please answer my question? I asked you whether or not you thought that the figure of \$75,000.00 for half of the stock that the holding company owned was, in your opinion, a fair value at that time?

A. Yes.

Q. Then why did you come down to \$35,000.00 for all of it?

(Deposition of Lloyd R. Arnold.)

A. Because Mr. Bercut wasn't interested in putting up that amount of money.

Q. Did Mr. Bercut say he would pay not a cent more than thirty-five thousand?

A. At first we got to fifty thousand, and then down to thirty-five thousand.

Q. Why did you come down to fifty thousand? Why did you come down to fifty thousand?

A. In order to accomplish the things we were trying to do.

Q. I am asking you, why did you come down to a valuation of fifty thousand dollars for a majority of all the stock you owned, if at the beginning you thought seventy-five thousand dollars was a reasonable value?

A. Because Mr. Bercut wouldn't pay that figure.

Q. In other words, Mr. Bercut thought it was too high? Is that right?

A. Well, that is correct.

Q. All right. Then why didn't you say so?

A. I don't know just what you are getting at.

Q. Well, when you came down to fifty thousand what did Mr. Bercut say to that figure?

A. He wasn't satisfied with that figure.

Q. Did he say that was too high?

A. Yes, that was too high.

Q. Did you come down to forty thousand?

A. No, I don't think so.

Q. Did you come right down immediately next to thirty-five thousand?

(Deposition of Lloyd R. Arnold.)

A. I believe Mr. Bercut stated thirty-five, and I said, "We ought to have more so that we can pay off some of the obligations of the holding company."

Q. And what did he say to that?

A. Thirty-five thousand was his top figure.

Q. For how many shares?

A. All of it—we to get our option to buy back twenty thousand.

Q. Now, when you told Mr. Bercut that you wanted more money than thirty-five thousand so that you could pay off some of the obligations of the holding company, in view of the fact that the holding company was almost a half million dollar asset, what did he say to that?

A. Well, he didn't say any more.

Q. Did he say to you that the obligations of the holding company were none of his business?

A. I can't say that he said that, no.

Q. Well, how did he put it, if he said anything at all?

A. The only thing I can say is that, no matter what we would discuss or say, we couldn't get Mr. Bercut to pay any more for it.

Q. And who suggested the option for 20,000 shares at 50¢ a share?

A. I suggested it.

Q. Didn't you ask for an option of half of the 78,000 shares? You said you wanted to keep a minority position, didn't you?

A. I said that we wanted to keep a minority

(Deposition of Lloyd R. Arnold.)

position. That was before we got to the point of discussing an option to repurchase.

Q. Who fixed the number of shares to be optioned?

A. As a result of our conversations we arrived at an arbitrary figure of twenty thousand.

Q. Well, did you ask for more?

A. I don't remember. There were a lot of conversations here. I probably did ask for more, but I can't positively state.

Q. Weren't you interested in keeping a minority position in the company?

A. I wanted to get an option to buy all that Mr. Bercut would be agreeable to letting us buy.

Q. Who fixed the number of shares at twenty thousand? Did Mr. Bercut say to you that it was the most he would option back to you?

A. That was the most we could get, or I certainly would have got an option for more.

Q. Would you have taken an option for more if Mr. Bercut had been willing to give it to you?

A. Yes, we would.

Q. Did you try to get more than 20,000 shares under option from Mr. Bercut?

A. Yes, I tried to get more. I know that.

Q. Well, you certainly thought at that time that the stock was worth more than 50¢ a share, didn't you?

A. Yes, I did.

Q. And you would have been willing to take an

(Deposition of Lloyd R. Arnold.)

option back for two years for all of this block of stock at 50¢ a share, wouldn't you?

A. If we could have got it, sure.

Q. Did you ask for it?

A. I don't believe that I asked for the full amount, no.

Q. Did you ask for more than 20,000 shares?

A. Yes, I asked for more.

Q. And Mr. Bercut refused—is that right?

A. Yes, that is all I could get.

Q. All right. Now, who suggested the clause in the contract here reading as follows:

“It is further understood and agreed, in this connection, that all of the voting rights on the said 20,000 shares herein referred to shall remain with Peter Bercut for a period of seven years from date hereof, whether or not the said 20,000 shares are purchased by the corporation.”

A. Mr. Bercut said he would have to have the voting rights.

Q. So the option was given you subject to that stipulation—is that right?

A. That is correct.

Q. Who suggested the clause: “All rights and privileges of Pacific Empire Holdings, Inc., in connection with the 20,000 shares of common stock, hereinabove referred to are not assignable.”?

A. Mr. Bercut stated that.

Q. Did he give you any reason why he wanted

(Deposition of Lloyd R. Arnold.)

this restriction on the right of the holding company to buy back this 20,000 shares by prohibiting it from assigning the option?

A. No, I don't recall any reason for it. In fact, I didn't think much about it, I guess.

Q. Well, you mean to say that you paid no attention to that clause when you dictated it, Mr. Arnold?

A. I most certainly did pay attention to it.

Q. Did it make any impression upon you when that clause was put in there?

A. Mr. Bercut wanted it that way.

Q. Well, why did he want it that way? Did he say at all? Did he give you his reasons?

A. No, I don't think so.

Q. Well, isn't it a fact that he told you he didn't want any one else to exercise this option but the holding company?

A. He said that he was giving that option to the holding company.

Q. Yes. A. The holding company only.

Q. Yes.

A. And that was the reason for putting it that way.

Q. Didn't you tell him when he made that statement, Mr. Arnold, that Mr. Bercut knew that the holding company could never exercise this option?

A. Oh, well, that is a little different. Yes. I said this to Mr. Bercut—I said, "Well, after all, I don't know how we are going to get the ten thou-

(Deposition of Lloyd R. Arnold.)

sand, and furthermore we are still obligated to the Merchants."

Q. And what did he say to you about that?

A. I can't recall what he said.

Q. Well, why didn't you insist on having that option available to the holding company or any one else that the holding company might want to sell it to or assign it to?

A. Because—I can only answer it this way, that we had to get the transaction over then, and I wasn't going to raise arguments or conditions that were technical there.

Q. You mean you were in a hurry to close the deal? Is that it?

A. I have already stated the reason——

Q. Answer "Yes" or "No," were you in a hurry? A. Yes, I was.

Q. And Mr. Bercut knew you were in a hurry, didn't he? A. He did, yes.

Q. You told him so, didn't you?

A. Certainly.

Q. You told him that these clauses were not fair, didn't you?

Mr. Goodman: He didn't say that.

Mr. Scampini: I am asking him if he did or did not.

Mr. Goodman: Oh.

A. I didn't say that in so many words, but——

Mr. Scampini: Q. Substantially?

A. It goes without saying we wanted a block of

(Deposition of Lloyd R. Arnold.)

that stock to be retained by the holding company, retained by the option. We wanted all we could get. We got that. I have lost your question now. Did I answer it there?

Mr. Scampini: Read the question, Mr. Reporter, and see if you can answer the question without jumping all over the field.

(Last question read.)

Q. Did you or did you not tell him that they were unfair? A. Not in those words.

Q. Well, what did you say to him?

A. I told him it wasn't what we wanted.

Q. And what did he say to that?

A. That it was all he could do.

Q. And because of the pressure of circumstances, you felt that you should make the deal? Is that right? A. That is it exactly.

Q. Now, when he told you that this was all he could do, did you ask for two or three days time in which to think it over?

A. No, that was the final agreement.

Q. Did you ask for two or three days time within which to see if the company could make a better deal anywhere else? A. No, I did not.

Q. Did you ask for two or three days time in which to find out if the board of directors would approve this kind of a deal?

A. No, I didn't.

Q. Did you deliver to Mr. Peter Bercut the 78,358 shares of stock of the Merchants Ice & Cold Storage Company referred to in this agreement?

(Deposition of Lloyd R. Arnold.)

A. We delivered all but—I think there was a few shares we didn't work out in this—1400 shares.

Q. Where are the 1400 shares now?

A. Mr. Will Morrish has them somewhere.

Q. What is he doing with them?

A. In the contract file there is an agreement where we—in other words, while Mr. Sherman was president of the Merchants, in order to get Mr. Morrish to come in—he was close to the Anglo, and we were having trouble with our loans there, and we wanted him to do so, and—well, he wanted a fee to serve on the board of directors and as a member of the committee down there, and we paid him. We started out with \$100.00 a month, and I think it ended up with two hundred and fifty a month, and then as a part of the agreement—in other words, if he ever left the Merchants or our policies didn't agree; it was a sort of mutual understanding that we should pay him the number of months. I can't think how many. That agreement is around there somewhere.

Q. Whose shares are these 1400 shares?

A. They belong to the holding company.

Q. What are they—preferred or common?

A. They are mostly common.

Q. All the rest of the stock has been delivered to Mr. Bercut?

A. All the rest has been delivered to Mr. Bercut.

Q. Now, you made some statements about the value of this stock on the market. Preferred stock

(Deposition of Lloyd R. Arnold.)

was worth from a dollar to two dollars and a half per share during the period 1938, '39 and '40—is that right? A. The preferred stock?

Q. Yes. A. Yes.

Q. Now, was the condition of the Merchants Ice & Cold Storage Company better or worse, substantially speaking, generally speaking, in 1938 or '39, than it was in 1934? A. Yes.

Q. Was it better or worse? A. In '38?

Q. Yes. A. Yes, it was better.

Q. It was better than it was in 1934, wasn't it? A. Yes.

Q. The bond issue had been——

A. Oh, surely.

Q. (Continuing:) ——had been deferred?

A. Yes.

Q. And the company had been reorganized in the Federal Court—is that right?

A. That is right.

Q. You had gotten a postponement of the maturity of your bonds? A. That is right.

Q. And \$40,000.00 a year of bonds had been paid off continuously since 1934—isn't that right?

A. That is right, up to the date of the reorganization.

Q. And thereafter they were paid off according to the indenture, weren't they?

A. That is right.

Q. And the interest had been paid right along?

A. That is right.

(Deposition of Lloyd R. Arnold.)

Q. And the debts of the company in 1938 were less, were they not, than in 1934?

A. They were less, yes.

Q. In other words, the company was much better, in your opinion, was it not, financially speaking and also from an operating point of view, in 1938 and '39, than it was in 1934—wasn't it?

A. Most certainly.

Q. Then I will ask you to take a look at this contract and see if you recognize it (showing document to the witness).

A. Yes, I do.

Q. What is that contract? I will ask it this way: Did you in 1934 agree to buy from Mr. Roussel, a director of Merchants Ice & Cold Storage Company, 700 shares of preferred stock of Merchants Ice & Cold Storage Company for \$11,200.00?

A. We did.

Mr. Goodman: Excuse me. That is 1934?

Mr. Scampini: Yes.

Mr. Goodman: I would like to object to that on the ground—well, let it go. Go right ahead.

A. Yes, we did.

Mr. Scampini: Q. Did you think that that was a fair value for that stock for 700 shares of preferred stock in 1934?

A. Yes, I did.

Q. And do you think that the sum of \$10.00 a share for preferred stock would be a fair value for preferred stock in 1938?

A. Yes, with all the accumulated dividends particularly.

(Deposition of Lloyd R. Arnold.)

Q. Now, was the condition of the Merchants Ice & Cold Storage Company better or worse in January of 1941 than it was in 1938, generally speaking?

Mr. Goodman: Of course, that does call for his opinion.

Mr. Scampini: Yes, I know; but when we come to opinions, I think you have gone into it quite at length. He was president of the company at the time.

Mr. Goodman: Well, of course—I will make the objection it calls for his opinion and——

Mr. Scampini: I will withdraw the question and reframe it.

Q. In 1940 and 1941, you were president of the Merchants Ice & Cold Storage Company?

A. That is right.

Q. You were also a director in 1938 and 1937, weren't you?

A. That is right.

Q. You were generally familiar with the financial and operating condition of the company throughout those periods of years, weren't you?

A. That is correct.

Q. You knew the conditions of the company intimately in 1938, '39 and '40, didn't you?

A. Yes.

Q. You often loaned money to the Merchants Ice & Cold Storage Company from the holding company during that period of years?

A. Many times.

(Deposition of Lloyd R. Arnold.)

Q. And you examined the balance sheets and earnings statements with great scrutiny during that period of years, didn't you?

A. I was very familiar with them.

Q. Now, I will ask you whether or not the financial condition of the company in January of 1941 and its operating condition were better or worse than they were in 1938?

Mr. Goodman: The same objection.

A. The general financial condition was—its earnings were higher. The general financial condition of the Merchants was better.

Mr. Scampini: Q. There were just some pressing immediate problems—is that right?

A. It is a combination of the things I have mentioned here. In a general way, its financial condition—its general financial condition would have been better, yes.

Q. And its earning position was better than it was in 1938, wasn't it?

A. 1939 I believe was our best year. 1940 wasn't quite as high, but it was good.

Q. I will ask you, was it worse in 1938? Instead of "was it better?" Was it worse?

A. Was it worse in 1938?

Q. In 1941—was it worse in 1941, at the end of 1940, than it was at the end of 1938?

A. I have just said its general condition was better.

Q. All right. Now, if you thought that the rea-

(Deposition of Lloyd R. Arnold.)

sonable value of preferred stock in 1938 was at least \$10.00 a share, and it was \$10.00 a share and more in 1934, then why did you agree to sell 12,000 shares of preferred stock and 65,000 shares of common stock for \$35,000.00, Mr. Arnold?

A. Because of the pressure of circumstances that I have just testified about.

Q. And not because you thought that was the reasonable value?

A. Absolutely no. I thoroughly believed in the future of Merchants.

Q. What would you think that the actual reasonable value of this block of stock, free from pressure, was in January of 1941?

A. I believe in the value that we carried it at.

Q. Was that half a million dollars?

A. I believed in that, or else we would not have carried it at that.

Q. All right. But because of these pressing conditions you thought it advisable to sell the whole thing for \$35,000.00? Is that right?

A. That is correct.

Q. And you never would have sold it in the absence of those pressing conditions? Is that right?

A. No, I would not.

Q. All right. Now, Mr. Goodman asked you whether or not Pacific Empire Corporation lost the stock—whether the stock of Pacific Empire Corporation lost its value when it lost the Pacific National Bank stock, which it did a few months ago, and you said yes. Is that right?

(Deposition of Lloyd R. Arnold.)

Mr. Goodman: No.

Mr. Scampini: Maybe I misunderstood. I withdraw the question. I thought Mr. Goodman had asked you that question. Perhaps I misunderstood.

Q. Did you have any other informal understandings with Mr. Peter Bercut with regard to an additional consideration besides that which is enumerated in this letter agreement?

A. None whatsoever.

Q. Did you have any discussion with Mr. Peter Bercut about the Merchants Ice & Cold Storage Company wiping out the balance of the indebtedness of the holding company to Merchants Ice & Cold Storage Company?

A. In our conversation about this time I think I asked, probably, if something like that could be done or should be done.

Q. What did he say to you?

A. Well, he would give it some thought.

Q. Is that all he said to you?

A. We didn't have any understanding, written understanding or agreement on the subject.

Q. Are you prepared to state under oath that the only understanding you had with Mr. Peter Bercut with respect to the sale and purchase of this block of stock is that which is enumerated in this letter agreement?

A. Except just what I have said, yes.

Q. Well, what do you mean by "except just what I said, yes?"

A. In other words, I think I made the statement

(Deposition of Lloyd R. Arnold.)

once myself that that—that those obligations should be written off or forgotten about, or something; it certainly wasn't collectible.

Q. Mr. Arnold, why wasn't it collectible?

A. Well, we didn't certainly have the cash to pay for it then.

Q. You didn't have any assets left, did you?

A. Not to speak of, no.

Q. When the Merchants Ice & Cold Storage Company went, why, the only real asset of the company went with it, didn't it?

A. The main asset left.

Q. Was there anything left except the Pacific Empire Corporation stock?

A. No, except the laundry.

Q. Well, the laundry, in which the company owned only 47½%?

A. That is right.

Q. And you had pledged that to Howard Ellis as security for a debt, had you not?

A. I believe it was pledged then, yes.

Q. And the Pacific Empire Corporation stock was worth money only while the holding company could pay its debts to the corporation? Is that right?

A. That is right.

Q. And the holding company had no more money with which to pay its debts? Is that right?

A. That is correct.

Q. So you couldn't see any salvation for it—is that right?

A. I certainly couldn't see very much, no.

Q. So you made the deal with Mr. Bercut?

(Deposition of Lloyd R. Arnold.)

A. Certainly I did, yes.

Mr. Scampini: I think that will be all.

Mr. Goodman: I have a few questions.

Recross Examination

Mr. Goodman: Q. In addition to the other pressing financial obligations of the Merchants Ice in January, 1941—that is, in addition to the ones we have already talked about heretofore—it is a fact, is it not, that the money was not available for the next payment of interest on the bonds?

A. The next payment wasn't due until April 1st, I believe, of each——

Q. A certain number of bonds were to be retired at that time, were they not, under the indenture? There was \$40,000.00 worth of bonds——

A. Well, my hesitancy was—I was thinking that that came up the following year. The interest was coming due on April 1st.

Q. And \$40,000.00 in bonds had to be retired?

A. I am not sure of my dates on that.

Mr. Scampini: Pardon me. Off record.

(Discussion off record.)

A. I was thinking it was the following year. I may be wrong.

Mr. Goodman: We will pass that for the moment.

Q. This transaction that you referred to with Mr. Roussel in 1936, by which the shares were purchased—Roussel was a stockholder of the Merchants Ice, who wanted to get a job down there? Isn't that the case? Isn't that the situation that you are referring to?

(Deposition of Lloyd R. Arnold.)

A. Well, if he ever wanted a job, I didn't know that.

Q. Wasn't that the reason why they purchased his stock?

A. No, he was there, it seems to me, as a friend of Mr. Sherman—I don't know. At least, he had been on the Board of the Merchants for quite a while.

Q. But that was a special transaction that was entered into with Mr. Roussel for some reason or another to acquire his stock, wasn't it?

A. Well, there was a block of stock that we wanted; we tried to get any that we could.

Q. But there was some particular reason that caused the purchase of Roussel's stock in 1936, wasn't there?

A. We had—the holding company gave him an option, which then we took up later on—gave him the option in 1934, I believe it was, and took it up in 1936.

Q. What money was used to buy the Roussel shares of stock? Where did you get the money to pay for those shares?

A. That was all paid—that was paid from the Merchants, but charged to the holding company.

Q. So that—

A. I am not sure whether all the payments were that way, but I think the majority of them were.

Q. But that is the way his stock was bought—that is the way his stock was acquired?

(Deposition of Lloyd R. Arnold.)

A. Well, at that time the Merchants was obligated to the holding company.

Q. The Merchants had an obligation to the holding company on loans——

A. Of the holding company to the Merchants, yes.

Q. Now, when you were discussing this deal with Mr. Bercut—strike that out. Am I correct in saying that during the discussions with Mr. Bercut concerning this deal, that Mr. Bercut said that he would not be interested in making a deal for the purchase of this stock unless he was able to have the controlling interest and elect a board of directors of his own choosing—that is, a majority of the board of directors?

A. Well, he wanted to, yes.

Q. And is it not also a fact that in connection with the same conversation that he stated that he did not want to have men who had been so unsuccessful in operating this company continue on the board of directors? A. Yes, he said that.

Q. Now, at the time that you completed the transaction with Mr. Bercut, it is a fact, is it not, that you knew—that there was no other place that you knew of that you could make a deal for the holding company that would accomplish the purposes that you have stated you had in mind?

A. Yes, that is correct.

Q. And you dickered back and forth with Mr. Devoto—or with Mr. Bercut, and as a result of

(Deposition of Lloyd R. Arnold.)

dickering back and forth on the matter the final figure that was arrived at was \$35,000.00?

A. That is correct.

Q. That was as high as Mr. Bercut felt he could go?

A. As high as he would go.

Mr. Goodman: One other matter before we conclude the deposition, Mr. Scampini.

Mr. Scampini: Yes.

Mr. Goodman: In the complaint the proceedings in Delaware are set forth. Are you willing to furnish us at our expense with copies of the Delaware proceedings?

(Discussion off record.)

Mr. Goodman: Well, I think that is about all. Now, how about signing it?

Mr. Scampini: I have just two more questions.

Redirect Examination

Mr. Scampini: Q. Mr. Arnold, at the time you made the deal with Mr. Bercut, Mr. Chase was a large creditor of the holding company, was he not?

A. Yes, he was.

Q. Did you ever go upstairs to see Mr. Chase and find out whether he would be willing to pay you a higher price than \$35,000.00 for this block of shares?

A. No.

Q. Sometime during the course of your business affairs with Mr. Chase, which I understand ran over a long period of years——

A. Yes.

Q. (Continuing:) ——Mr. Chase had told you

(Deposition of Lloyd R. Arnold.)

whenever you would be ready to dispose of Merchants Ice he might be interested?

A. I don't know whether he said it in those words. He said something about his interest in the Merchants, yes, and he was upset when he found that we had sold it.

Q. Now, did you ever ask Mr. Joseph I. McInerney whether he would be interested in paying more than \$35,000.00 for this block of shares?

A. No, I didn't.

Q. During the period of time that you had been associated with Mr. McInerney—strike that out, Mr. Reporter, please. Mr. McInerney from time to time had loaned the holding company money, had he not, from 1934 until 1940?

A. Yes.

Q. From time to time he had loaned money for the use of the Merchants Ice & Cold Storage Company, had he not?

A. Yes.

Q. In fact, one of the principal installments on the bond issue of the Merchants Ice & Cold Storage Company was made by the holding company borrowing from Mr. McInerney the proceeds? Isn't that right?

A. I don't know whether we borrowed the full amount for the sinking fund requirement—

Q. Was it interest?

A. Incidentally, I know definitely that we borrowed the taxes once.

Q. Yes.

A. And we borrowed to make up on the interest.

(Deposition of Lloyd R. Arnold.)

Q. Now, the holding company had bought a large block of stock in the Merchants Ice & Cold Storage Company from Mr. McInerney, had it not?

A. Yes, we did. That was our original meeting.

Q. And Mr. McInerney was attorney for the Merchants Ice & Cold Storage Company after I resigned, wasn't he?

A. Yes, he was—that is, his office of McInerney & Vucinich.

Q. He was quite familiar with the financial condition and operating condition of the Merchants Ice & Cold Storage Company, wasn't he?

A. He was familiar with it all right.

Q. Isn't it true that sometime during the last two or three years in one of your discussions with Mr. McInerney, that he advised you that he might be interested in the event that you were——

A. Yes, he did.

Q. Did you take it up with him after Mr. Ber-cut told you he wouldn't pay you more than \$35,000.00?

A. No, I didn't.

Q. In the course of years that Mr. Scampini was a director of the Merchants Ice & Cold Storage Company and also an attorney for the company, isn't it true that Mr. Scampini told you on numerous occasions that in the event the holding company should ever have to sell that block of stock, that he or some of his associates might be interested in it?

A. Yes, you always expressed interest in that.

Q. And when it came to selling this block of

(Deposition of Lloyd R. Arnold.)

stock to Mr. Peter Bercut, at that time Mr. Scampini was a creditor of the holding company, wasn't he? A. Yes.

Q. Did you come over to discuss with Mr. Scampini the advisability of selling this stock or ask him whether he would be interested in it?

A. No, I didn't.

Q. Now, isn't it true that after you sold this block of stock to Mr. Peter Bercut, that Mr. Scampini met you and Mr. Maffei on one occasion on the street and asked you what was behind the deal of the holding company and Mr. Peter Bercut that he had read in the newspaper?

A. I do remember meeting you on the street, yes.

Q. And isn't it true that you and Mr. Maffei told Mr. Scampini at that time that you had only sold a majority holding and that you retained a minority holding in the Merchants Ice & Cold Storage Company?

Mr. Goodman: Of course, this is cross-examination of your own witness, and also calls for——

A. We told you that we had sold the majority of our holdings, and that we had retained some, yes.

Mr. Scampini: Q. That is right. And the first time that Mr. Scampini, so far as you know, discovered the true facts was when you came here with Mr. Maffei and discussed this whole picture with me when you received this letter from Mr. Wingate? Isn't that right?

(Deposition of Lloyd R. Arnold.)

Mr. Goodman: I will object to that as calling for a conclusion, and cross-examination.

Mr. Scampini: Yes. I will withdraw the question. That is all.

Mr. Goodman: I think that is all.

Mr. Scampini: Another question—just a minute.

Q. Isn't it true that you told Mr. Richards and Mr. Ryerson, Mr. Arnold, after the deal was made, that the Merchants Ice & Cold Storage Company retained a minority interest therein?

Mr. Goodman: The same objection.

A. Without going into the details of the transaction, I indicated then that we had retained some stock. I didn't want to——

Q. Yes. No further questions.

L. R. ARNOLD

“PLAINTIFFS’ EXHIBITS 1-A, 1-B, 1-C
AND 1-D FOR IDENTIFICATION”

Minute Books, Vols. I, III, IV and V

“PLAINTIFFS’ EXHIBIT No. 2”

ASSIGNMENT BY WAY OF PLEDGE

Know All Men by These Presents:

That whereas Pacific Empire Holdings, Inc., a corporation, hereinafter known as First Party, and Pacific Empire Corporation, a California corporation, hereinafter known as Second Party, did, on the 15th day of May, 1935, enter into an agree-

ment, a copy of which agreement is hereto attached and made a part hereof by reference; and

Whereas, under and by virtue of said agreement First Party did agree to assign over and unto Second Party 49,944 $\frac{1}{3}$ number of shares of common stock, and 3,990 number of preferred stock, of Merchants Ice & Cold Storage Company, a California corporation, as security for the payment to said Pacific Empire Corporation of any and all indebtedness due or owing by First Party to Second Party under the said agreement and created by virtue of loans to be made pursuant thereto by Second Party to First Party;

Now, therefore, in consideration of the premises and as and for the purpose of securing the payment of any and all of such obligations incurred by First Party to Second Party, and for the purpose of paying, according to their respective tenors, any and all promissory notes or other evidences of indebtedness now owing, or hereafter to be incurred, by First Party, either pursuant to said agreement, or by reason of any other acts of borrowing by First Party from Second Party, or by reason of any assumption of any liability by first Party from Second Party, or for any other reason whatever, First Party does hereby assign, transfer and sell and set over unto Second Party 49,944 $\frac{1}{3}$ number of shares of the common stock, and 3,990 number of shares of preferred stock of Merchants Ice & Cold Storage Company, a corporation, represented by the certificates of stock described on the hereto

attached Exhibit "A", all of which said shares of stock and certificates are now on pledge with Joseph McInerney as security, together with other collateral, for the payment to said Joseph McInerney of a promissory note in the sum of Fifty Thousand (\$50,000.00) Dollars, dated May 8, 1935, executed jointly to said Joseph McInerney by First Party and Second Party herein;

This assignment by way of pledge is executed specifically subject to the lien created by said pledge to said Joseph McInerney, and Second Party does hereby accept the assignment, transfer and sale of said shares, as security for the payment of the indebtedness hereinabove referred to, subject to the lien created in favor of said Joseph McInerney by said pledge agreement, and does further admit and declare that the said promissory note in the sum of Fifty Thousand (\$50,000.00) Dollars, executed jointly between the First Party and Second Party to said Joseph McInerney, is the primary and sole obligation of Second Party herein, and said promissory note is to be paid according to its tenor by Second Party herein, and any and all collateral pledged with said Joseph McInerney by First Party herein, as security for the payment of said promissory note, is the sole and absolute property of First Party and is to be returned to First Party free and clear of any claims on the part of said Joseph McInerney arising out of said promissory note for which the same are held as security.

In Witness Whereof, the parties hereto have hereunto set their hands this 15th day of May, 1935, by their officers thereunto properly authorized by a resolution of their respective board of directors.

PACIFIC EMPIRE CORPORATION,
a corporation,

By M. MAFFEI,

President.

By A. A. HEER, JR.,

Secretary.

PACIFIC EMPIRE HOLDINGS,
INC., a Delaware corporation,

By L. R. ARNOLD,

First Vice-President.

By A. A. HEER, JR.,

Treasurer.

[Endorsed]: Assignment by way of pledge.

Dated: June, 1935.

“PLAINTIFFS’ EXHIBIT No. 3”

PACIFIC EMPIRE HOLDINGS

Incorporated

Second Copy

January 8, 1941

Mr. Peter Bercut
739 Market Street
San Francisco, California

Dear Mr. Bercut:

The following will confirm our understanding and agreement relating to the sale to you by this corporation, Pacific Empire Holdings, Inc., of the controlling shares of stock of Merchants Ice and Cold Storage Company, now owned by this corporation.

The purchase price, as agreed to be paid by Peter Bercut, is \$35,000.00, for which it is agreed that Peter Bercut is to receive, in accordance with the following conditions, the total of 78,358 shares of stock of Merchants Ice and Cold Storage Company, consisting of 12,495 shares of Preferred stock and 65,863 shares of Common stock.

It is agreed by this corporation that out of the proceeds of this sale, to wit, \$35,000.00, the sum of \$25,000.00 will be paid by this corporation to Merchants Ice and Cold Storage Company. Out of the balance remaining, the sum of \$6,000.00 is to be

remitted to Pacific National Bank, in order to secure the release from them of all stock of Merchants Ice and Cold Storage Company now on pledge as security for the obligations of the corporation to Pacific National Bank.

It is further understood and agreed that 5,516 $\frac{2}{3}$ shares of Preferred stock of Merchants Ice and Cold Storage Company, now held by California Baking Company as security for the balance owing by the corporation of \$4,100.00 is to be delivered to Peter Bercut when this obligation is paid.

It is understood and agreed by Peter Bercut that the corporation shall have the option to purchase, at 50¢ per share, all or any part of 20,000 shares of Common stock of Merchants Ice and Cold Storage Company within two years from date hereof. It is understood that the corporation may obtain delivery of any portion of the 20,000 shares as paid for, from time to time, within the said two year period. It is further understood and agreed, in this connection, that all of the voting rights on the said 20,000 shares herein referred to shall remain with Peter Bercut for a period of seven years from date hereof, whether or not the said 20,000 shares are purchased by the corporation. All rights and privileges of Pacific Empire Holdings, Inc., in connection with the 20,000 shares

of Common stock, hereinabove referred to are not assignable.

Yours very truly,

PACIFIC EMPIRE HOLDINGS,
INCORPORATED

By.....

Pres.

By.....

Secy.

Agreed and Accepted:

.....
Peter Bercut

—
“PLAINTIFFS’ EXHIBIT No. 4”

March 31, 1940

Pacific Empire Holdings, Inc.

26 O’Farrell Street

San Francisco, California

Gentlemen:

Because of the pressure of other business, I will be unable to devote sufficient time to the company to be of real value.

Consequently, please consider this lettter my resignation as an Officer and Director of Pacific Empire Holdings, Inc.

Yours very truly,

PETER BERCUT

PB/lk

“PLAINTIFFS’ EXHIBITS 5-A, 5-B AND 5-C
FOR IDENTIFICATION”

Current Records of Pacific Empire
Holdings; General Ledger; and Journal

“DEFENDANTS’ EXHIBIT A.”

THOMAS H. WINGATE

Attorney at Law
Equitable Building
Wilmington, Delaware

July 16, 1942

Pacific Empire Holdings, Inc.
26 O’Farrell Street
San Francisco, California

Dear Sirs:

I have been retained by a group of stockholders of Pacific Empire Holdings, Inc. who have requested that I file a Bill of Complaint against the corporation, seeking the appointment of a receiver on the ground of mismanagement and for the purpose of having a receiver to bring stockholders’ derivative action against the individual directors for mismanagement and waste of the corporate assets. The stockholders also request that I file a petition for a Writ of Mandamus to secure a full and complete examination of the corporation’s books and records.

I am reluctant to resort to these extraordinary remedies without giving the management an oppor-

tunity to state their position. If you care to discuss these proceedings with me, I shall be glad to do so. In the event I do not hear from you on or before July 29th, I shall understand that you do not wish to discuss the matter, and I will proceed to file the proceedings.

Very truly yours,

THOMAS H. WINGATE

W/mlt

General - Holdings & Co., Incorporated
 1919-20 by amendment to
 Articles of Incorporation, incorporated

Authorized Capital
 500,000 Sh. 10 cent Par Value
 5,000,000 Sh.

Liabilities

Accounts Payable, Notes
 Accounts Payable, Notes & Charge - Rent
 General Interest Payable - Notes

Notes Payable

Corporations Trust Co.
 Pacific National Bank
 Commercial Bank
 Edgemoor National Bank
 Western Bank
 Harbor Bank

175000
 117000
 50825
 188788
 385000
 743326

1659939

129551
 407500
 46647

Notes Payable

San Francisco Branch 1900-21
 San Francisco Branch Property
 Western Branch

5137
 10668
 47325

63130

Debt Company: Notes and Accounts Payable
 Debt: Pacific National Bank
 Pacific National Bank
 Liquidating Agent, City National Bank

118838
 1664680
 7165462

Mechanics and Civil Engineers Co.

2501537
 2501537

To Pay 5284.05
 Corp. Fund 36.00

Defendants Ex. B for Security
 R.R. Robinson
 Attorney



State of California,
City and County of San Francisco—ss.

I, Mary T. Collins, a Notary Public in and for the City and County of San Francisco, State of California, do hereby certify:

That the witness in the foregoing deposition named, Lloyd R. Arnold, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth, in the within-entitled cause; that said deposition was taken at the times and place therein named; that the testimony of said witness was taken down in shorthand by R. R. Roberson, a competent official shorthand reporter and a disinterested person, and by him thereafter reduced to long-hand typewriting, under my supervision, and when completed, was carefully read to, or by, the said witness, and, being corrected by him in every particular he desired, was by him thereafter duly subscribed.

And I further certify that I am not of counsel or attorney for either of the parties to said deposition, nor in any way interested in the outcome of the cause named in said caption.

In Witness Whereof, I have hereunto set my hand and affixed my seal of office, this 8th day of October, one thousand nine hundred and forty-two.

MARY T. COLLINS

Notary Public in and for the City and County
of San Francisco, State of California.

[Notarial Seal]

My Commission expires March 30, 1943.

[Endorsed]: Filed Apr. 21, 1943. Walter B. Maling, Clerk.

[Endorsed]: Reporter's Transcript. Filed Aug. 13, 1943.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW PROPOSED BY THE PLAINTIFF

The above entitled cause coming on regularly to be heard on the 20th day of April, 1943, before the above entitled Court, without a jury, Honorable Michael J. Roche presiding, a jury trial not having been demanded; plaintiff appearing in Court by his attorneys A. J. Scampini, L. F. Mahan, Howard Ellis and C. T. Hubner; defendants, Peter Bercut and Henry Bercut, appearing in Court by their attorneys, Louis H. Brownstone and George M. Naus; defendants, M. Maffei and L. R. Arnold, appearing in Court by their attorney J. A. Pardini; the above entitled cause having been dismissed in open Court as to all other defendants; and oral and documentary evidence having been introduced on April 20, 1943, [418] and the cause having been duly and regularly continued to and tried on successive days thereafter and oral and documentary evidence having been introduced on said days, and the matter having been briefed by counsel for all parties and having been submitted to this Court for decision,

and the Court being fully advised in the premises now finds:

FINDINGS OF FACT

I.

That this Court has jurisdiction of the above entitled cause. Plaintiff was at the time of the commencement of this action and still is a citizen and resident of the State of Delaware. Pacific Empire Holdings, Incorporated, at all times was, and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware. Each of the defendants named in the complaint on file herein was at the time of the commencement of this action, ever since has been, and still is a citizen and resident of the State of California, and [419] resides within the jurisdiction of this Court. The matter in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000.

II.

Pacific Empire Holdings, Incorporated, a Delaware corporation, has its principal office in the City and County of San Francisco, State of California, and at all times has conducted its principal activities in said city and state. On the 31st day of August, 1942, in the Court of Chancery of the State of Delaware in and for New Castle County, in that certain action of Rebecca Tanzer and Elizabeth Wilhelm, complainants, vs. Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, defendant, upon proceedings being duly

had in said Court pursuant to provisions of section 4407 of the Revised Code of Delaware of 1935, the said Pacific Empire Holdings, Incorporated, was adjudged and decreed to be insolvent in the equity sense, and Thomas H. Wingate, the plaintiff herein, of the City of Wilmington, State of Delaware, was appointed Receiver of Pacific Empire Holdings, Incorporated, with full power to take charge of the estate, effects, business and affairs thereof, to collect the outstanding debts due and belonging to the said Pacific Empire Holdings, Incorporated, and with power to prosecute and defend in the name of said Pacific Empire Holdings, Incorporated, or otherwise, all claims and suits. Said Thomas H. Wingate has qualified as such receiver of and for Pacific Empire Holdings, Incorporated, and he is now the duly appointed, qualified and acting receiver in equity for said corporation.

Under and pursuant to Section 4408 of the Revised Code of Delaware of 1935, now in full force and effect, said Thomas H. Wingate, as such receiver, has been and now is vested with the title of said Pacific Empire Holdings, Incorporated, a corporation, [420] to all its books, papers and documents, interests in patents, patent rights, copyrights, and trade-marks, rights of action arising upon contract or from the unlawful taking or detention of or injury to property, real, personal or mixed, of whatever nature, kind, class or description, and wheresoever situate, except real estate situate outside of the State of Delaware.

III.

Pacific Empire Holdings, Incorporated, was originally incorporated under the laws of the State of Delaware with the name of Associated Calitalo Holdings, Ltd. Inc., and thereafter by amendment to its certificate of incorporation duly made in accordance with the law its corporate name was changed to Pacific Empire Holdings, Incorporated. As of this day Pacific Empire Holdings, Incorporated, has outstanding 2,500,000 shares of common stock of a par value of ten cents (10¢) a share owned by approximately 10,000 stockholders. It has aggregate liabilities in excess of \$250,000. Its principal activities have at all times been conducted in California.

IV.

Beginning on or about 1931 and continuing thereafter Pacific Empire Holdings, Incorporated, from time to time acquired, for the sum of \$400,000, shares of stock consisting of common and preferred of Merchants Ice and Cold Storage Company, a California corporation, conducting and operating an ice and cold storage business in the City and County of San Francisco, State of California. The shares of stock so acquired by Pacific Empire Holdings, Incorporated, represented, in the aggregate, the control of said corporation. [421]

V.

On or about December 31, 1940, Pacific Empire Holdings, Incorporated, was the owner of 78,358 shares of the capital stock of Merchants Ice and Cold Storage Company, consisting of 12,493 shares

of preferred stock of the par value of \$10 per share, and 65,863 shares of common stock of the par value of \$10 per share. The said preferred shares of stock of Merchants Ice and Cold Storage Company were entitled to cumulative dividends at the rate of 7% per annum, and as of December 31, 1940, the amount of dividends which had been accumulated on said outstanding preferred shares and remaining unpaid was the sum of \$11.20 per share.

VI.

As of December 31, 1940, Merchants Ice and Cold Storage Company had a net book worth of \$1,415,725 represented by 41,615 shares of \$10 par preferred stock outstanding, and 107,180 shares of common stock, without par value, outstanding. The Court finds that said company has been continuously engaged in a general cold storage and ice manufacturing business in San Francisco from since about 1890; that at no time had it ever defaulted in any of its obligations; that the operations of said company during the years 1939 and 1940 reflected a substantial improvement over immediately previous years; and that it was a solvent concern. [422]

VII.

On or about December 31, 1940, Pacific Empire Holdings, Incorporated, had aggregate liabilities in excess of \$250,000, evidenced by promissory notes outstanding, accounts payable and unpaid taxes. Among such liabilities was a judgment obtained by the United States of America in an action filed by

the United States of America in the above entitled court against Pacific Empire Holdings, Incorporated, being action No. 21147-W, in the office of the Clerk of said Court. In this said action, on November 20, 1940, judgment had been obtained in favor of the United States of America against Pacific Empire Holdings, Incorporated, in the sum of \$11,945.32. Said judgment on December 31, 1940, was and still is unpaid. On December 31, 1940, the only substantial assets of Pacific Empire Holdings, Incorporated, other than the said 78,358 shares of common and preferred stock owned by it in Merchants Ice and Cold Storage Company were as follows:

47½% or thereabouts of the outstanding capital stock of California Pacific Service Corporation, a California corporation, operating laundries in Bakersfield, California, of nominal value;

52% of the outstanding capital stock of Pacific Empire Corporation, a California corporation, of nominal value.

VIII.

Continuously since approximately the year 1933 up to and including on or about January 28, 1941, the defendants M. Maffei, Peter Bercut and L. R. Arnold were, and each of them was either an officer or a director or a member of the Executive Committee of Pacific Empire Holdings, Incorporated, a corporation. During said period M. Maffei was

President, Peter Bercut was Vice President and L. R. Arnold was Secretary-Treasurer of said corporation. On or about February 15, 1933, Peter Bercut was elected and became a director of said corporation. On or about February 19, 1935, Peter Bercut was elected and became a member of [423] the Executive Committee of said corporation and on or about March 28, 1933, defendant Peter Bercut was elected and became a Vice President of said corporation. Said Peter Bercut continued as a director, vice president and member of the Executive Committee of said corporation until his resignation as such director, officer and member on or about the 28th day of January, 1941. From approximately the year 1933 up to and including January 8, 1941, the business and affairs of said corporation were actively carried on and conducted by said executive committee consisting of M. Maffei, L. R. Arnold and Peter Bercut. Said M. Maffei, L. R. Arnold and Peter Bercut were, and each of them was, familiar with all matters and things appertaining to the condition and affairs of the corporation and with the knowledge and consent and approval of its directors actively managed, controlled, carried on and conducted the business and affairs of Pacific Empire Holdings, Incorporated. During all of said time the defendants M. Maffei, Peter Bercut and L. R. Arnold took an active part in the management and direction of the affairs of Pacific Empire Holdings, Incorporated, and in the preparation of all of its financial statements and

reports sent to the stockholders of said corporation, or issued in connection with the operations of said corporation and in the supervision of the management and affairs of its subsidiaries, as hereinafter found.

IX.

Since on or about 1933 and up to and including on or about January 28, 1941, Pacific Empire Holdings, Incorporated, owned a majority of the outstanding capital stock of Pacific Empire Corporation, a California corporation. Said corporation, during all of said time, owned a substantial interest in Pacific National Bank of San Francisco, a National bank. During all of said time the active management of the affairs of said corporation [424] was conducted by and under the supervision of the defendants M. Maffei, Peter Bercut and L. R. Arnold. The said corporation, during all of said time, had a board of five directors, three of whom were the defendants M. Maffei, Peter Bercut and L. R. Arnold. During all of said time the defendant M. Maffei was president and defendant Peter Bercut was vice president of said corporation. During said period of time Pacific Empire Holdings, Incorporated, from time to time borrowed large sums of money from Pacific Empire Corporation. On or about January 28, 1941, Pacific Empire Holdings, Incorporated, was and still is indebted to Pacific Empire Corporation in a sum in excess of \$150,000.

X.

From about 1934 to and including about January 8, 1941, Merchants Ice and Cold Storage Com-

pany was a subsidiary of Pacific Empire Holdings, Incorporated, and during all of said period of time the active management of Merchants Ice and Cold Storage Company was under the supervision of and conducted by the executive officers of Pacific Empire Holdings, Incorporated. On January 8, 1941, and for some time prior thereto, the defendant L. R. Arnold was the president, general manager and one of the directors of Merchants Ice and Cold Storage Company, the defendant M. Maffei was vice president and one of the directors of Merchants Ice and Cold Storage Company and the defendant Peter Bercut was a director of Merchants Ice and Cold Storage Company.

XI.

From on or about 1934 to and including January 8, 1941, California Pacific Service, Inc., a California corporation, was a subsidiary of Pacific Empire Holdings, Incorporated, and the management of the affairs of California Pacific Service, Inc. during all of said time was under the active supervision of the [425] executive officers of Pacific Empire Holdings, Incorporated, and especially of the defendants M. Maffei, L. R. Arnold and Peter Bercut. From time to time Pacific Empire Holdings, Incorporated, borrowed large sums of money from California Pacific Service, Inc., and on January 8, 1941, Pacific Empire Holdings, Incorporated, was and still is indebted to California Pacific Service, Inc. in a sum in excess of \$30,000.

XII.

From on or about 1933 to January 8, 1941, Pacific Empire Holdings, Incorporated, through its ownership of a majority of the outstanding capital stock of Pacific Empire Corporation, owned a substantial interest in the Pacific National Bank of San Francisco, and from time to time the defendants M. Maffei, Peter Bercut and L. R. Arnold were members of the board of directors of said Pacific National Bank of San Francisco, representing the interests of Pacific Empire Holdings, Incorporated, and of its said subsidiary Pacific Empire Corporation in said bank. From time to time Pacific Empire Holdings, Incorporated, and Pacific Empire Corporation borrowed large sums of money from said Pacific National Bank of San Francisco, and on January 8, 1941, Pacific Empire Holdings, Incorporated and Pacific Empire Corporation were indebted to said bank in a sum in excess of \$50,000. On January 8, 1941, the defendants M. Maffei and Peter Bercut were directors of said Pacific National Bank of San Francisco representing the interests of Pacific Empire Corporation in said bank.

XIII.

The Court does hereby specially find that on or about January 28, 1941, the defendant Peter Bercut filed his written resignation as a director of Pacific Empire Holdings, Incorporated, with L. R. Arnold, then and there the vice president of Pacific [426] Empire Holdings, Incorporated. Said letter of res-

ignation bears date of March, 1940, but the court does hereby specially find that the said letter of resignation was not written, signed or delivered by the defendant Peter Bercut until on or about January 28, 1941, and that said resignation of Peter Bercut was at no time ever accepted by the board of directors of Pacific Empire Holdings, Incorporated, until on or about August 20, 1942. The court does further specially find that at no time prior to January 8, 1941, or subsequent thereto, did the defendant Peter Bercut ever resign as an officer or director of Pacific Empire Corporation, Merchants Ice and Cold Storage Company or Pacific National Bank of San Francisco. The Court does further specially find that M. Maffei, Peter Bercut and L. R. Arnold were the active officers and managers of the affairs and business of Pacific Empire Corporation, Merchants Ice and Cold Storage Company and California Pacific Service, Inc., each and all of them subsidiaries of Pacific Empire Holdings, Incorporated, up to and including January 8, 1941, and thereafter each and all of them were fully familiar with all of the affairs of said corporations and of the financial condition of Pacific Empire Holdings, Incorporated, Pacific Empire Corporation and Merchants Ice and Cold Storage Company.

XIV.

On December 31, 1940, the By-Laws of Pacific Empire Holdings, Inc., then in full force and effect, provided as follows:

Article IX of said By-Laws, dealing with the office of the president, states:

“Section 1. Nature of Office. The president shall be the chief executive officer and head of the corporation and shall have general control and management of its business and affairs subject to the control of the board of directors.”

Article X of said By-Laws, dealing with the office of vice president, states:

“The vice president in the absence or inability to act of the president is vested with all the powers and shall perform all the duties of the [427] president. If there be more than one vice president, they shall be numbered and each shall act in the absence or inability to act of the president and of all vice presidents preceding him in number. In such acts and in the execution of writings by such vice presidents, it shall not be necessary to recite the absence or inability of any preceding officer to act.”

Article XI of said By-Laws, dealing with the office of Secretary, states:

“Section 1. Nature of Office. The secretary *shall ex-officio*, secretary and clerk of the board of directors and secretary of all stockholders' meetings and of the executive and of all other committees. He shall attend to all their sessions and shall record all votes and minutes of their proceedings in a book or books kept for that purpose.

“Section 2. Notices. He shall give or serve all notices required by law or the order of the president and all notices required of all meetings of the stockholders, directors and committees when not otherwise legally given. In case of his absence, inability, refusal or neglect so to do, then such notices may be given or served by any person thereunto directed by the president.

“Section 3. Certificates of Stock. He shall keep a book of blank certificates of stock, and shall fill out and countersign all certificates of stock issued, and make entries evidencing such issuance on the margin of said book.

“Section 4. Corporate Seal. He shall keep the corporate seal and he shall affix said seal to all papers requiring the affixation thereof, including certificates of stock.

“Section 5. Transfer Book. He shall keep a transfer book and a stock ledger in debit and credit form showing the number of shares issued to and transferred by any stockholder and the dates of such issuance and transfer.

“Section 6. Account Books. He shall keep proper account books, in debit and credit form, of all moneys received by or paid out by the corporation. He shall as often as required by the president make and file in the office of the company a trial balance sheet and shall as often as required make and file in the office of the company a balance sheet showing profits and

losses of the company as appear by its books.

“Section 7. General Duties. He shall in general perform all other duties required by the president, directors or committees.” [428]

Article VI of said By-Laws, dealing with the duties of directors, sub-section 6 thereof, states:

“Management. The board of directors shall manage and control the business of the corporation.”

Article VII of said By-Laws, dealing with the duties of the executive committee, states:

“Section 1. Appointment. The directors may appoint an executive committee from their own number to consist of such number as they shall see fit.

Section 2. Powers. Any executive committee appointed by the board of directors shall have authority to exercise all the powers of the board of directors when said board is not in session, but subject to the immediate disaffirmance by the board at its next meeting after receiving the report of the acts done by said committee. Such committee may act by the written consent of all its members although not formally convened.

Section 3. Removal. Members of this committee may be removed as such and their successors may be appointed by the board and said committee may be abolished at any time by the board of directors.”

XV.

On or about December 31, 1940, the defendants Peter Bercut, M. Maffei and L. R. Arnold, who then and there were officers and directors of Pacific Empire Holdings, Incorporated, and members of its executive committee and in active supervision over the affairs of said corporation and its subsidiaries Pacific Empire Corporation, Merchants Ice and Cold Storage Company and California Pacific Service, Inc., and who then and there knew that a judgment had been obtained by the United States of America against Pacific Empire Holdings, Incorporated, as hereinbefore found by the court, and that execution on said judgment was imminent, and who then and there knew that Pacific Empire Holdings, Incorporated, was not able to satisfy the said judgment or bond against the same or appeal therefrom, and who then and there knew that Pacific Empire Holdings, [429] Incorporated, and its subsidiaries, were in imminent danger of being declared insolvent because of its inability to pay or meet its obligations, agreed among themselves, without consulting the board of directors of Pacific Empire Holdings, Incorporated, or any of its subsidiaries, to the effect that the defendant Peter Bercut should purchase, for the sum of \$35,000 the 12,493 shares of preferred stock and 65,863 shares of common stock of Merchants Ice and Cold Storage Company then and there owned by Pacific Empire Holdings, Incorporated, of which sum of \$35,000 Pacific Empire Holdings, Incorporated, was to retain \$10,000,

and \$25,000 was to be paid by it, simultaneously with the transaction to Merchants Ice and Cold Storage Company, on account of certain indebtedness then and there asserted to be owing by Pacific Empire Holdings, Incorporated to Merchants Ice and Cold Storage Company.

XVI.

The court does hereby specifically find that at said time, to-wit, on or about December 31, 1940, the said 12,493 shares of preferred stock of Merchants Ice and Cold Storage Company were carried and valued on the books of Pacific Empire Holdings, Incorporated at the sum of \$123,456.66, and the said 65,863 shares of common stock of Merchants Ice and Cold Storage Company were carried and valued on the books of Pacific Empire Holdings, Incorporated, at the sum of \$545,906.81. The court does further specifically find that said valuation was based upon the audited statements of Merchants Ice and Cold Storage Company prepared by John F. Forbes & Co., certified public accountants, reflecting the balance sheet and operations of said company for the year ending December 31, 1939.

XVII.

The court does further specifically find that on or about June 30, 1940, the defendants M. Maffei, L. R. Arnold and [430] Peter Bercut, then and there constituting the officers and executive committee of Pacific Empire Holdings, Incorporated, issued a

financial report of Pacific Empire Holdings, Incorporated, to their stockholders reflecting the financial condition of said company as of December 31, 1939, and that in said communication to the stockholders the said shares of Merchants Ice and Cold Storage Company were declared to be worth the sums hereinbefore found, and that the financial condition of Merchants Ice and Cold Storage Company was declared to be considerably improved over that of the previous years and that it was hoped that Merchants Ice and Cold Storage Company would soon go on a dividend paying basis.

XVIII.

The court does hereby specifically find that upon said agreement having been made between the defendants M. Maffei, L. R. Arnold and Peter Bercut, as hereinbefore found, the said defendants purported to execute a written agreement, which agreement so executed was as follows:

“January 8, 1941.

Mr. Peter Bercut
739 Market Street
San Francisco, Cal.

Dear Mr. Bercut:

The following will confirm our understanding and agreement relating to the sale to you by this corporation, Pacific Empire Holdings, Inc., of the controlling shares of stock of Merchants Ice and Cold Storage Company, now owned by this corporation.

The purchase price, as agreed to be paid by Peter Bercut, is \$35,000, for which it is agreed that Peter Bercut is to receive, in accordance with the following conditions, the total of 78,358 shares of stock of Merchants Ice and Cold Storage Company, consisting of 12,495 shares of Preferred stock and 65,863 shares of Common Stock.

It is agreed by this corporation that out of the proceeds of this sale, to-wit, \$35,000, the sum of \$25,000 will be paid by this corporation to Merchants Ice and Cold Storage Company. Out of the balance remaining, the sum of \$6,000 is to be remitted to Pacific National Bank, in order to secure the release from them of all stock of Merchants Ice and Cold Storage Company now on pledge as security for the obligations of the corporation to Pacific National Bank. [431]

It is further understood and agreed that 5,516 $\frac{2}{3}$ shares of Preferred stock of Merchants Ice and Cold Storage Company, now held by California Baking Company as security for the balance owing by the corporation of \$4,100 is to be delivered to Peter Bercut when this obligation is paid.

It is understood and agreed by Peter Bercut that the corporation shall have the option to purchase, at 50¢ per share, all or any part of 20,000 shares of Common stock of Merchants Ice and Cold Storage Company within two

years from date hereof. It is understood that the corporation may obtain delivery of any portion of the 20,000 shares as paid for, from time to time, within the said two year period. It is further understood and agreed, in this connection, that all of the voting rights on the said 20,000 shares herein referred to shall remain with Peter Bercut for a period of seven years from date hereof, whether or not the said 20,000 shares are purchased by the corporation. All rights and privileges of Pacific Empire Holdings, Incorporated, in connection with the 20,000 shares of Common stock hereinabove referred to are not assignable.

Yours very truly,

PACIFIC EMPIRE HOLDINGS,
INCORPORATED

By M. MAFFEI, Pres.

By L. R. ARNOLD, Secy.

Agreed and Accepted:

PETER BER CUT."

XIX.

The court does hereby specifically find that neither prior to nor at any time subsequent to the execution of said agreement between said parties was there ever held any meeting of the board of directors or of the executive committee of Pacific Empire Holdings, Incorporated for the purpose of passing upon, approving, ratifying or confirming

the execution of said agreement by said persons for and on behalf of Pacific Empire Holdings, Incorporated, other than as hereinbefore found by the court.

XX.

The court does hereby find that at said time the board of directors of Pacific Empire Holdings, Incorporated, consisted of the following members:

M. Maffei, A. A. Heer, L. R. Arnold, Luigi Giachino, Webb Richards, Peter Bercut, T. M. Ryerson. [432]

XXI.

The court further finds that at no time were any of the directors of Pacific Empire Holdings, Incorporated, called into session for the purpose of passing upon, approving, ratifying or confirming the said transaction, other than as hereinafter found by the court. The court does further find that at no time were directors Webb Richards, T. M. Ryerson, Luigi Giachino or A. A. Heer ever consulted with respect to the advisability of entering into said transaction or with respect to approving, ratifying or affirming the said transaction other than as hereinafter found. The court does further find that prior to December 31, 1940, the defendants M. Maffei and L. R. Arnold had been repeatedly advised by business interests not connected with Pacific Empire Holdings, Incorporated, that in the event it was decided to dispose of said shares of Merchants Ice and Cold Storage Company that said business interest would be interested in sub-

mitting bids therefor, and the court does further find that prior to entering into said transaction with said Peter Bercut no effort was made by any of the said defendants to ascertain whether or not any other person, firm or corporation would be interested in purchasing the said shares of Merchants Ice and Cold Storage Company agreed to be sold to the defendant Peter Bercut for a price higher than paid by Peter Bercut. The court does further find that the stockholders of Pacific Empire Holdings, Incorporated and Pacific Empire Corporation at no time were ever advised of the sale of said shares of stock to Peter Bercut, and at no time were any of the stockholders of said corporation ever called into session for the purpose of approving, ratifying and confirming the said transaction. The court further finds that the said transaction was carried on between said parties in a secret and hasty manner, and that after the said transaction had taken place, upon [433] inquiry having been made by directors, creditors and stockholders the said defendants M. Maffei and L. R. Arnold did not disclose to said inquiring persons the true nature of said transaction. The court does further specifically find that at said time, to-wit, on or about December 31, 1940, Pacific Empire Holdings, Incorporated, was indebted to William F. Morrish, then and there Chairman of the Board of Directors of Merchants Ice and Cold Storage Company, in a sum of money, to-wit: \$3,000, which the said company had borrowed from said William F. Morrish and as security

therefor had pledged with said William F. Morrish 1500 shares of said common stock and 150 shares of said preferred stock of Merchants Ice and Cold Storage Company, and the court does hereby further specifically find that the said William F. Morrish deemed the said security adequate protection for his said loan. As a result of the transaction hereinbefore found Pacific Empire Holdings, Incorporated, was rendered insolvent and incapable of meeting its obligations.

XXII.

The court further finds that on August 20, 1942, a special meeting of the board of directors of Pacific Empire Holdings, Incorporated, was held for the purpose of passing upon a proposal looking towards consent to the appointment of an Equity Receiver for the Company. At said meeting the nature of the transaction had between and conducted by defendants M. Maffei, L. R. Arnold and Peter Bercut was discussed, and at said meeting the directors of the corporation, for the first time, were advised of the nature and character of the transaction. The court further finds that at said meeting the directors were advised that certain stockholders and creditors had threatened to file suit in the Chancery Court of the State of Delaware for the purpose of appointing a receiver for the company, and at said meeting the [434] said directors were advised by A. J. Scampini, Esq., one of the creditors of the company, and attorney at law, who

then and there had been consulted by the officers of the company with respect to the threatened litigation in Delaware, that in his opinion the said transaction had with Peter Bercut was illegal and that it should be repudiated by the directors, and that the proper party to repudiate the said transaction and to prosecute the claim of the company against the defendants responsible for the said transaction was an Equity Receiver. The court further finds that at said meeting the resignation of the director Peter Bercut was accepted, and all of the remaining directors then and there or thereafter in writing approved and consented to the appointment of an Equity Receiver in the State of Delaware to the end and purpose that such receiver might proceed to disaffirm the said transaction and to bring suit against the parties responsible therefor, for the purpose of recovering said shares of stock for the company.

XXIII.

The court further finds that the said meeting of August 20, 1942, was the first meeting of the board of directors of Pacific Empire Holdings, Incorporated, held after the said transaction and the first time when the board of directors of said company were fully advised of its nature and character and given the opportunity to pass upon the same. That upon the appointment of plaintiff herein, as Receiver in Equity for Pacific Empire Holdings, Incorporated, the said transaction with Peter Bercut

was repudiated by the receiver, in writing. Thereupon, the above entitled action was instituted by said receiver for the purpose of recovering the said shares of stock of Merchants Ice and Cold Storage Company. The court further finds that during [435] the progress of the action the said receiver offered to restore to the defendant Peter Bercut the consideration paid by him for the said shares of stock but that said offer was refused by the defendant Peter Bercut. The court further finds that said plaintiff made demand upon defendant Peter Bercut for the return of the said shares of stock acquired by him pursuant to the said agreement dated January 8, 1941, but that said demand was refused by the defendant Peter Bercut. The court further finds that defendant, Henri Bercut asserts an interest in the said shares but that the said interest was acquired by the defendant Henri Bercut through Peter Bercut with full knowledge of the nature and circumstances of the transaction had by and between the defendants Peter Bercut, M. Maffei and L. R. Arnold. The court further finds that during all of the period of time intervening between January 8, 1941, and August 20, 1942, the defendants M. Maffei and L. R. Arnold controlled the activities of Pacific Empire Holdings, Incorporated and directed the affairs of said company without consultation with its board of directors, and wilfully suppressed the facts, nature and circumstances of said transaction from the board of directors and stockholders of the said company. The court fur-

ther finds that as a result of the said transaction had by and between the said defendants pursuant to said agreement dated January 8, 1941, Pacific Empire Holdings, Incorporated, was deprived of substantially all of its assets, and that the said 78,358 shares of stock of Merchants Ice and Cold Storage Company transferred to Peter Bercut as the result of said transaction represented substantially all of the assets of Pacific Empire Holdings, Incorporated.

XXIV.

The court further finds that at no time either prior or [436] subsequent to the said transaction bearing date of January 8, 1941, was there ever any resolution adopted by either the executive committee of Pacific Empire Holdings, Incorporated, or by its board of directors or its stockholders at any meeting legally and lawfully assembled for the purpose of authorizing the officers of the company to execute the said agreement dated January 8, 1941, or for the purpose of authorizing, ratifying or confirming the said transaction had by and between the said defendants M. Maffei, L. R. Arnold and Peter Bercut dated January 8, 1941.

XXV.

The Court further finds that Pacific Empire Corporation is not a necessary party to the determination of this action.

XXVI.

The Court further finds that plaintiff is not barred by any laches or by any statute of limitation

in the prosecution of [437] this action and is not estopped from denying and questioning the validity of said contract and transaction.

XXVII.

The Court further finds that plaintiff has capacity to sue in this Court and to prosecute this action.

And as Conclusions of Law from the foregoing findings of fact the Court concludes as follows:

CONCLUSIONS OF LAW

1. Plaintiff is entitled to judgment against the defendants Peter Bercut and Henri Bercut adjudging and decreeing that the 12,493 shares of preferred stock and 65,863 shares of common stock of Merchants Ice and Cold Storage Company, acquired by Peter Bercut as the result of the said transaction dated January 8, 1941, are and at all times have been the property of Pacific Empire Holdings, Incorporated, and of plaintiff herein, its receiver.

2. In all matters and things appertaining to the said shares of stock the said defendants have been and now are the trustees for plaintiff, and the said defendants are unlawfully in possession of the said shares and that plaintiff is entitled to judgment for the delivery of said shares.

3. That the defendants Peter Bercut and Henri Bercut are not entitled to judgment against plaintiff on the cross-complaint filed herein against plaintiff.

4. That each and all of the parties hereto pay their own costs of suit herein incurred.

And it is ordered and directed that judgment be entered accordingly.

Dated: San Francisco, California, July, 1943.

.....
Judge

[Endorsed]: Lodged July 23, 1943. [438]

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[Title of District Court and Cause.]

EXCEPTIONS OF PLAINTIFF TO THE
FINDINGS OF FACT AND CONCLUSIONS
OF LAW PROPOSED BY THE DEFEND-
ANTS PETER BERCUT AND HENRI
BERCUT

Now comes Thomas H. Wingate as receiver in equity for Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, the plaintiff herein, and takes exception to the Findings of Fact and Conclusions of Law submitted and proposed by the defendants Peter Bercut and Henri Bercut, and as grounds for such exceptions plaintiff states:

I.

Finding III proposed by the said defendants is erroneous and contrary to and not supported by the evidence, in that the [439] evidence adduced at the trial conclusively discloses that the defendant Peter Bercut was a director, vice president and member of the executive committee of Pacific Empire Hold-

ings, Incorporated, until August 20, 1942, and that the said defendant, together with the defendants M. Maffei and L. R. Arnold, actively managed, supervised and conducted the affairs of said corporation and of its subsidiaries from its inception on or about 1931 to on or about January 8, 1941. Plaintiff further alleges that the evidence conclusively discloses that defendant Peter Bercut, in all matters and things of any substantial nature appertaining to the conduct of the affairs and business of said corporation and of its subsidiaries, Pacific Empire Corporation, Merchants Ice and Cold Storage Company, and California Pacific Service, Inc., was consulted by the defendants M. Maffei and L. R. Arnold and he participated in the directors and executive committee meetings and approved, without objection, all of the acts and deeds of M. Maffei and L. R. Arnold and of said executive committee during all of said period of time. The evidence further conclusively discloses that said defendant Peter Bercut at no time ever resigned as an officer and director of Pacific Empire Corporation and as a director of Merchants Ice and Cold Storage Company, both of these companies being subsidiaries of Pacific Empire Holdings, Incorporated. The evidence further discloses that said defendant Peter Bercut, together with the defendants M. Maffei and L. R. Arnold, as the executive officers of Pacific Empire Holdings, Incorporated, and constituting its executive committee, prepared and supervised

all financial statements and reports of said corporation mailed to its stockholders during all of said period.

II.

Plaintiff takes exception to Finding IV of said defendant [440] and states that there is no evidence in the record to sustain a finding by the court that the value of the 12,493 shares of preferred stock and the 65,863 shares of the common stock of Merchants Ice and Cold Storage Company, owned by Pacific Empire Holdings, Incorporated, on January 8, 1941, had a reasonable value of only \$35,000, and in this connection plaintiff states that the evidence conclusively proves that the reasonable value of said shares as a block at said time was not less than \$250,000.

Plaintiff further takes exception to the finding contained therein to the effect that none of said shares of Merchants Ice and Cold Storage Company were, on January 8, 1941, on pledge with Pacific Empire Corporation, and in this connection plaintiff states that the evidence in the record discloses a pledge of a substantial portion of said shares to said corporation in the year 1935, and no evidence was thereupon offered by either side with respect to whether or not the said pledge was ever satisfied. In this connection plaintiff further alleges that said finding is not an ultimate fact to be found by the court in the cause since Pacific Empire Corporation is not a party to the cause and its interests and

rights in said shares cannot be judicially passed upon by this court without its presence in the cause.

Plaintiff further takes exception to the finding contained therein to the effect that all borrowings by Merchants Ice and Cold Storage Company from Pacific Empire Holdings, Incorporated, had been paid in full on January 8, 1941, and that Pacific Empire Holdings, Incorporated, was, on said date, indebted to Merchants Ice and Cold Storage Company, and as grounds for this exception this plaintiff states that such a finding is not one of ultimate fact and that the legality of any claim by Merchants Ice and Cold Storage Company against Pacific Empire Holdings, Incorporated, [441] arising out of any such alleged indebtedness, cannot be passed upon by this court and the action is not between Pacific Empire Holdings, Incorporated and Merchants Ice and Cold Storage Company.

III.

Plaintiff excepts to Finding V and states that said finding is contrary to the evidence in that the evidence conclusively proves that the defendant Peter Bercut was an officer, to-wit, vice president, director and member of the executive committee of said company on January 8, 1941.

IV.

Plaintiff takes exception to Finding VI on the ground that it is not a complete finding of fact

because the evidence discloses that the portion of the By-Laws of Pacific Empire Holdings, Incorporated, read into the record included sections other than those set forth in said Finding VI, and said finding is not a complete finding of the fact with respect to said By-Laws.

V.

Plaintiff takes exception to Finding VII and states that said finding is contrary to the evidence and contrary to law in that the action of M. Maffei and L. R. Arnold, in executing the agreement with Peter Bercut dated January 8, 1941, was not within the scope and course of their authority, but on the contrary, was without the course and scope of their authority, and the said parties had no authority to bind Pacific Empire Holdings, Incorporated by their execution of the said agreement for and on behalf of the said corporation.

Plaintiff excepts to the finding in said Finding VII to the effect that said agreement of sale dated January 8, 1941, was in all respects fair and equitable to Pacific Empire Holdings, Incorporated, and was entered into in good faith after lengthy [442] negotiations at arms length by and between said corporation acting through independent and disinterested officers and directors, and said Peter Bercut, and upon full disclosure of all facts relating thereto, and in this connection plaintiff states that such a finding is a mere conclusion of law; that the said agreement of January 8, 1941, was not fair

and equitable to Pacific Empire Holdings, Incorporated, and the same was not entered into in good faith and at arms length by and between said corporation, and said Peter Bercut, but on the contrary was the result of secret, nefarious and hasty negotiations between the defendants M. Maffei, L. R. Arnold and Peter Bercut, without the knowledge of the board of directors of said company, and without any authority on the part of said persons to so engage in any such transaction.

Plaintiff further states that the finding therein to the effect that the sum of \$35,000 was a fair, reasonable and proper price for said shares is not supported by the evidence, and is irrelevant and immaterial for the reason that the corporation as such never engaged in any transaction with Peter Bercut and the contract dated January 8, 1941, is not the corporate act of Pacific Empire Holdings, Incorporated. Plaintiff states that the said contract is not binding upon said corporation and was and is not the corporate act of Pacific Empire Holdings, Incorporated.

Plaintiff further excepts to the finding found therein to the effect that at the time of the said purchase, to-wit, on or about January 8, 1941, none of the said shares acquired by Peter Bercut pursuant to said agreement were in pledge to Pacific Empire Corporation for any sum, and in this connection plaintiff states that the evidence does not support such a finding, and that such a finding is irrelevant and immaterial and not one of [443] ulti-

mate fact and not a proper finding to be made herein, for the reason that Pacific Empire Corporation is not a party to this cause.

VI.

Plaintiff excepts to Finding VIII on the ground that it is contrary to law, not supported by any evidence and outside the jurisdiction of this court. Plaintiff further excepts to said finding on the ground that the transaction between the defendants M. Maffei, L. R. Arnold and Peter Bercut, dated January 8, 1941, was not the act and deed of Pacific Empire Holdings, Incorporated, but was the unauthorized and illegal act of the defendants, M. Maffei, L. R. Arnold and Peter Bercut, then and there acting without authority to bind the corporation and for their own personal benefit, contrary to the interests of the corporation of which they were trustees. Plaintiff further excepts to said finding on the ground that there is no evidence in the record proving that plaintiff is in possession of any shares of Merchants Ice and Cold Storage Company belonging to plaintiff, and on the further ground that no affirmative relief is available to said defendants as against plaintiff other than in the course of administration.

VII.

Plaintiff excepts to Finding IX on the ground that said finding is contrary to the evidence, and further states that the evidence conclusively dis-

closes that as the result of said transaction with Peter Bercut, dated January 8, 1941, Pacific Empire Corporation and Pacific Empire Holdings, Incorporated, were both rendered insolvent and unable to meet its indebtedness as it matured.

VIII.

Plaintiff excepts to Finding X, and states that said finding is contrary to the evidence in that Merchants Ice and Cold Storage Company was not in an insolvent condition on January 8, 1941, but on the contrary was in a solvent condition with a net worth of \$1,415,725.00.

Plaintiff further excepts to the said finding on the [444] ground that it is incompetent, irrelevant, immaterial, not a finding of ultimate fact, not supported by the evidence, and constitutes pure conclusions.

Plaintiff further excepts to the said finding on the ground that no estoppel or laches are available in behalf of the defendants against plaintiff because of the wrongful acts and conduct of the said defendants at all times immediately prior to January 8, 1941, and subsequent to said date, up to the date of the appointment of plaintiff as receiver.

Plaintiff further excepts to said finding, and especially to the finding found therein to the effect that Pacific Empire Holdings, Incorporated, and plaintiff herein, acquiesced and consented to the acts and conduct of Peter Bercut in reliance upon said contract of sale dated January 8, 1941, and in this connection plaintiff states that Pacific Empire

Holdings, Incorporated, and plaintiff at no time ever acquiesced or consented to any act or conduct on the part of Peter Bercut for the reason that up to and including August 20, 1942, said company was dominated, controlled and managed by the defendants M. Maffei and L. R. Arnold who were parties to the said agreement with Peter Bercut, and plaintiff, upon his appointment as receiver, immediately repudiated said transaction and instituted the present cause.

IX.

Plaintiff excepts to finding XI on the ground that the evidence conclusively discloses that plaintiff offered to restore the consideration paid by Peter Bercut for the said shares prior to the trial of the above cause, as well as in Open Court, but at no time did the defendant Peter Bercut ever accept the said offer. [445]

X.

Plaintiff excepts to Finding XII and XIII for the reason that the said findings and each of them are pure conclusions of law and not findings of ultimate facts, and for the further reasons that said findings are not supported by, but are contrary to the evidence.

XI.

Plaintiff further excepts to the conclusions of law proposed by the said defendants, and as grounds for such exceptions states that the said conclusions are not warranted by either the evidence or by proper finding, and they are contrary to law.

Wherefore, plaintiff proposes the attached amendments to the findings and conclusions of law and asks that said amended findings of fact and conclusions of law, as proposed herein, be made the findings of fact and conclusions of law of the court.

Dated: July 22, 1943.

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

C. T. HUBNER

IVAN CULBERTSON

Attorneys for Plaintiff

[Endorsed]: Filed July 23, 1943. [446]

[Title of District Court.]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 6th day of July, in the year of our Lord one thousand nine hundred and forty-three.

Present: the Honorable Michael J. Roche, D. J.

[Title of Cause.]

This case having been heretofore heard and submitted, and being now fully considered, it is by the Court ordered that judgment be entered herein in favor of the defendants upon findings of fact and

conclusions of law, the respective parties to pay their own costs. [447]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled cause coming on regularly to be heard on the 20th day of April, 1943, before the above entitled Court, without a jury, Honorable Michael J. Roche presiding, a jury trial not having been demanded; plaintiff appearing in Court by his attorneys, A. J. Scampini, L. F. Mahan, Howard Ellis and C. T. Hubner; defendants, Peter Bercut and Henri Bercut, appearing in Court by their attorneys, Louis H. Brownstone and George M. Naus; defendants, M. Maffei and L. R. Arnold, appearing [448] in Court by their attorney, J. A. Pardini; the above entitled cause having been dismissed in open Court as to all other defendants; and oral and documentary evidence having been introduced on April 20, 1943 and the cause having been duly and regularly continued to and tried on successive days thereafter and oral and documentary evidence having been introduced on said days, and the matter having been briefed by counsel for all parties and having been submitted to this Court for decision, and the Court being fully advised in the premises now finds:

FINDINGS OF FACT

I.

That this Court has jurisdiction of the above entitled cause. Plaintiff was at the time of the commencement of this action and still is a citizen and resident of the State of Delaware. Pacific Empire Holdings, Incorporated at all times was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware. Each of the defendants named in the complaint on file herein was at the time of the commencement of this action, ever since has been, and still is a citizen and resident of the State of California and resides within the jurisdiction of this Court. The matter in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Pacific Empire Holdings, Incorporated, a Delaware corporation, has its principal office in the City and County of San Francisco, State of California, and at all times has conducted its principal activities in said city and state. On the 31st day of August, 1942, in the Court of Chancery of the State of [449] Delaware in and for New Castle County, in that certain action of Rebecca Tanzer and Elizabeth Wilhelm, complainants, vs. Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, defendant, upon proceedings being duly had in said Court pursuant to provisions of Section 4407 of the Revised Code of Delaware of

1935, the said Pacific Empire Holdings, Incorporated was adjudged and decreed to be insolvent in the equity sense, and Thomas H. Wingate, the plaintiff herein, of the City of Wilmington, State of Delaware, was appointed Receiver of Pacific Empire Holdings, Incorporated with full power to take charge of the estate, effects, business and affairs thereof, to collect the outstanding debts due and belonging to the said Pacific Empire Holdings, Incorporated and with power to prosecute and defend in the name of said Pacific Empire Holdings, Incorporated, or otherwise, all claims and suits. Said Thomas H. Wingate has qualified as such receiver of and for Pacific Empire Holdings, Incorporated and he is now the duly appointed, qualified and acting receiver in equity for said corporation.

Under and pursuant to Section 4408 of the Revised Code of Delaware of 1935, now in full force and effect, said Thomas H. Wingate, as such receiver, has been and now is vested with the title of said Pacific Empire Holdings, Incorporated, a corporation, to all its books, papers and documents, interests in patents, patent rights, copyrights, and trade-marks, rights of action arising upon contract or from the unlawful taking or detention of or injury to property, real, personal or mixed, of whatever nature, kind, class or description, and wheresoever situate, except real estate situate outside of the State of Delaware.

III.

Continuously since approximately the year 1931 up to [450] and including August 20, 1942 and thereafter to the date hereof, M. Maffei and L. R. Arnold were, and each of them was a director and member of the Executive Committee of Pacific Empire Holdings, Incorporated, a corporation, and M. Maffei was President and L. R. Arnold was Vice-President and Secretary of said corporation. On or about February 15, 1933, defendant, Peter Bercut, was elected and became a Director of said corporation. On or about February 19, 1935, defendant, Peter Bercut, was elected and became a member of the Executive Committee of said corporation and on or about March 28, 1933, defendant, Peter Bercut, was elected and became a Vice-President of said corporation. Said Peter Bercut continued as a Director, Vice-President and member of the Executive Committee of said corporation until his resignation as such director, officer and member on or about the first day of May, 1940. From February 19, 1935 to on or about May 1, 1940, the Executive Committee of said corporation consisted of M. Maffei, L. R. Arnold and Peter Bercut. From and after May 1, 1940, to the date hereof the Executive Committee of said corporation consisted of M. Maffei and L. R. Arnold. From approximately the year 1931 up to and including August 20, 1942, the business and affairs of said corporation were actively carried on and conducted by M. Maffei and L. R. Arnold, the executive officers of said cor-

poration. Said M. Maffei and L. R. Arnold were, and each of them was, familiar with all matters and things appertaining to the condition and affairs of the corporation and with the knowledge and consent of its Directors actively managed, controlled, carried on and conducted its business and affairs. During all of said time, defendant, Peter Bercut, took no active part in the management or direction of the affairs of said corporation or the preparation of any financial statements in connection therewith or appertaining thereto. [450-A]

IV

At various times subsequent to 1931 to and including March 15, 1940, Pacific Empire Holdings, Incorporated acquired ownership of shares of common and preferred stock of Merchants Ice & Cold Storage Company, a corporation conducting an ice and cold storage business at San Francisco, California, at prices varying upwards from 12½¢ per share for common stock and \$1.00 per share for preferred stock. The total cost to Pacific Empire Holdings, Incorporated for all of said shares so acquired did not exceed the sum of \$250,000.00. On December 31, 1940 Pacific Empire Holdings, Incorporated was the owner of 78,358 shares of capital stock of Merchants Ice & Cold Storage Company, consisting of 12,493 shares of preferred stock and 65,863 shares of common stock. On said date and on January 8, 1941 the reasonable value of said shares was not in excess of the sum of \$35,000.00. None

of said shares were in pledge to Pacific Empire Corporation, a California corporation, as security for notes and accounts payable to Pacific Empire Corporation in the amount of \$136,855.34, or in any amount, or at all.

From 1931 to January 8, 1941, on occasions Pacific Empire Holdings, Incorporated loaned various amounts of money to Merchants Ice & Cold Storage Company and all of said loans were repaid in full by said Merchants Ice & Cold Storage Company. Similarly, during said period Merchants Ice & Cold Storage Company loaned various sums of money to Pacific Empire Holdings, Incorporated and on January 8, 1941 a large sum of money was due, owing and unpaid from Pacific Empire Holdings, Incorporated to Merchants Ice & Cold Storage Company, in addition to substantial sums owed to other persons by Pacific Empire Holdings, Incorporated.

In addition to the shares of Merchants Ice & Cold Storage [451] Company, on December 31, 1940 and on January 8, 1941 Pacific Empire Holdings, Incorporated owned 47½% of the outstanding capital stock of California Pacific Service Corporation, a California corporation, operating a laundry at Bakersfield, California, and said shares had a substantial value. On said date said corporation also owned 52% of the outstanding capital stock of Pacific Empire Corporation, a California corporation, and said shares had substantial value.

V

On or about January 8, 1941, in accordance with law and the Articles and By-laws of Pacific Empire Holdings, Incorporated, the said corporation had a Board of Directors consisting of an authorized number of seven Directors. At said time the Board consisted of six elected and serving Directors, namely, M. Maffei, A. A. Heer, Jr., L. R. Arnold, Luigi Giachino, Webb Richards and T. M. Ryerson. At said time, in accordance with law and the Articles and By-laws of Pacific Empire Holdings, Incorporated, said corporation had an Executive Committee consisting of an authorized number of three Directors and at said time, two of the Directors, namely, M. Maffei and L. R. Arnold, were duly elected, qualified and acting members of said Executive Committee.

VI

On or about January 8, 1941 the following By-law of Pacific Empire Holdings, Incorporated, among others, was in full force and effect.

“Article VII. Executive Committee

Section 1. Appointment

The directors may appoint an executive committee from their own number to consist of such number as they shall see fit. [452]

Section 2. Powers

Any executive committee appointed by the board of directors shall have authority to exercise all the powers of the board of directors

when said board is not in session, but subject to the immediate disaffirmance by the board at its next meeting after receiving the report of the acts done by said committee. Such committee may act by the written consent of all its members although not formally convened.

Section 3. Removal

Members of this committee may be removed as such and their successors may be appointed by the board and said committee may be abolished at any time by the board of directors."

VII

On or about January 8, 1941 Pacific Empire Holdings, Incorporated by and through its President, M. Maffei, and its Secretary, L. R. Arnold, acting within the course and scope of their authority for and on behalf of said corporation, sold to Peter Bercut for and on behalf of himself and Henri Bercut, and Peter Bercut for and on behalf of himself and his brother, Henri Bercut, purchased of and from Pacific Empire Holdings, Incorporated, for the sum of \$35,000.00, 78,358 shares of capital stock of Merchants Ice & Cold Storage Company, a California corporation, consisting of 12,495 shares of preferred stock and 65,863 shares of common stock of said corporation. Said agreement of sale was in writing and was in all respects fair and equitable to Pacific Empire Holdings, Incorporated and was entered into in good faith after lengthy negotiations, at arm's length, by and between the

said corporation acting through independent and disinterested officers and directors and the said Peter Bercut, and upon a full disclosure of all facts relating thereto. At said time and at all times subsequent to May 1940, defendant, Peter Bercut, was [453] not an officer or director or member of the Executive Committee of said corporation.

The price paid for said shares, to-wit, the sum of \$35,000.00, was a fair, reasonable and proper price for said shares. Said contract, and all of the terms thereof, was in all respects beneficial, fair and equitable to said corporation, and said contract was entered into for and on behalf of Pacific Empire Holdings, Incorporated under proper corporate authority by officers and directors and its executive committee duly authorized to act for and on behalf of said corporation and acting in accordance with law and its Articles and By-laws, honestly, independently and in good faith. Said contract was and is fully binding upon said corporation and is its corporate act. Subsequent to the execution of said contract, the Board of Directors of said corporation at a meeting duly and regularly called and held, did not disaffirm the said contract. On and about January 8, 1940, the shares of Merchants Ice & Cold Storage Company purchased by defendant, Peter Bercut, from Pacific Empire Holdings, Incorporated, as aforesaid, were reasonably worth a sum not in excess of \$35,000.00.

The said shares were purchased by Peter Bercut for and on behalf of himself and Henri Bercut

and for and on behalf of no other person or persons, and are now held by Peter and Henri Bercut for themselves and for no one else. Defendants, M. Maffei and L. R. Arnold did not then have, never have had, and do not now have, any interest in the shares so purchased, or any part thereof. None of the defendants, or any other person, firms, or corporations conspired and confederated together to purchase the said shares for a nominal consideration through the power, influence or position of any person or persons. There is no [454] evidence of a conspiracy in respect to any matters or things alleged in the complaint in file herein or in any other respect, or at all. At the time of the said purchase, none of said shares were in pledge to Pacific Empire Corporation for any sum, or amount, or at all.

VIII

On or about January 8, 1941 defendant, Peter Bercut, paid to Pacific Empire Holdings, Incorporated the sum of \$35,000.00., the full purchase price for the shares of Merchants Ice & Cold Storage Company and said Peter Bercut has fully performed each and all of the terms, covenants, agreements and conditions required to be performed by him under the terms, provisions and conditions of the agreement of sale dated January 8, 1941. From and out of the sum of \$35,000.00 paid to Pacific Empire Holdings, Incorporated for said shares, Pacific Empire Holdings, Incorporated paid \$25,000.00 to Merchants Ice & Cold Storage Company on ac-

count of an indebtedness owing by it to the Merchants Ice & Cold Storage Company substantially in excess of the amount of \$25,000.00.

Pursuant to said agreement, the said corporation delivered to Peter Bercut on account of the shares so sold, 6,670 shares of preferred stock and 62,341 shares of common stock of Merchants Ice & Cold Storage Company. In order to obtain possession of $5,516\frac{2}{3}$ shares of preferred stock so sold and at the express instance and request of Pacific Empire Holdings, Incorporated, on or about April 1, 1941 defendants, Peter Bercut and Henri Bercut, were compelled to, and did, advance and expend the sum of \$3,950.00 in payment of a claim against Pacific Empire Holdings, Incorporated, secured by a pledge of said $5,516\frac{2}{3}$ shares, and the said corporation promised and agreed to repay said sum to Henri Bercut. Subsequent to January 8, 1941 and as aforesaid, Pacific [455] Empire Holdings, Incorporated delivered to Peter Bercut $12,186\frac{2}{3}$ shares of preferred stock and 62,341 shares of common stock of Merchants Ice & Cold Storage Company. Pursuant to the terms and provisions of the agreement dated January 8, 1941 the said corporation has failed and refused to deliver to Peter Bercut the balance of $308\frac{1}{3}$ shares of preferred stock and 3,522 shares of common stock of Merchants Ice & Cold Storage Company required to be delivered thereunder.

Defendants, Peter Bercut and Henri Bercut, and each of them, have demanded payment of the sum

of \$3,950.00 and delivery of 308 $\frac{1}{3}$ shares of preferred stock and 3,522 shares of common stock of Merchants Ice & Cold Storage Company of and from Pacific Empire Holdings, Incorporated and of and from plaintiff but said corporation and said plaintiff have failed and refused to pay said sum, or any part thereof, save and except the sum of \$100.00, or to deliver said shares, or any part thereof, to said defendants, or either of them.

IX

The sale of said shares of Merchants Ice & Cold Storage Company, as aforesaid, did not render Pacific Empire Holdings, Incorporated

~~Corporation~~ insolvent or unable to meet its debts or other obligations and was not in fraud of its stockholders and creditors or its stockholders or creditors. The financial condition of said corporation was due to causes other than the sale of said shares.

X

On or about January 8, 1941, Merchants Ice & Cold Storage Company was in an insolvent condition; it had no funds with which to meet its payrolls and was about to collapse financially, and said facts and circumstances were fully known to Pacific Empire Holdings, Incorporated and its officers and directors. [456] The execution of the contract of purchase and sale of shares of Merchants Ice & Cold Storage Company by Pacific Empire Holdings, Incorporated to Peter Bercut under date of

January 8, 1941 and the facts and circumstances relating thereto were at said time known to Pacific Empire Holdings, Incorporated, its officers and directors and were a matter of public knowledge in San Francisco; and the sum of \$35,000.00 paid for said shares by Peter Bercut was a fair, reasonable and proper price for said shares. Upon the execution of said contract and in reliance thereon, Peter Bercut assumed the presidency and management of the Merchants Ice & Cold Storage Company and has continuously since the execution of said contract of date January 8, 1941 devoted himself and his financial resources to the rehabilitation and development of the business of Merchants Ice & Cold Storage Company. As a result thereof, Merchants Ice & Cold Storage Company has and had at and about the time of the filing of the complaint herein, a large and active business and is and was then operating upon a profitable basis. The acts of the said defendant, Peter Bercut, in this connection have been open and overt and at all times since January 8, 1941 have been fully known to the officers and directors of Pacific Empire Holdings, Incorporated and are a matter of public knowledge in San Francisco. At all times since January 8, 1941 Pacific Empire Holdings, Incorporated by and through its officers and directors has been fully aware of the acts and conduct of the said Peter Bercut in building up and developing the business of the said Merchants Ice & Cold Storage Company in reliance upon his ownership of the shares of the

Merchants Ice & Cold Storage Company purchased by him from Pacific Empire Holdings, Incorporated, as aforesaid. As a result of the efforts of Peter Bercut, as aforesaid, the shares of Merchants Ice & Cold [457] Storage Company purchased by Peter Bercut have greatly appreciated and enhanced in value since January 8, 1941. Pacific Empire Holdings, Incorporated and plaintiff herein have acquiesced and consented to the acts and conduct of Peter Bercut in reliance upon said contract of sale as hereinbefore alleged and by reason of such acquiescence and conduct upon their part are estopped from denying or questioning the validity of said contract and have been guilty of laches in connection with the matters and things set forth in the complaint on file herein.

XI

On or about the 9th day of September, 1942 plaintiff delivered a purported notice of repudiation of the transaction of the purchase and sale of said shares to Peter Bercut. ~~Plaintiff has failed to tender to defendant, Peter Bercut or Henri Bercut, or Peter and Henri Bercut, the sum of \$35,000.00, of any sum, or any amount at all.~~

XII

Defendants, Peter Bercut and Henri Bercut, ever since January 8, 1941 have been and now are lawfully in possession of the preferred and common shares of Merchants Ice & Cold Storage Company

stock sold and delivered to them pursuant to the contract of January 8, 1941, as heretofore set forth in these findings. No ground exists for the repudiation, recession or setting aside of the said contract and the sale of said shares and said contract at all times, from and after its execution, was, and still is, in full and legal force and effect and has not been lawfully rescinded or modified in any respect whatsoever.

XIII

At no time did defendants, Peter or Henri Bercut, or M. Maffei or L. R. Arnold, convert any shares of Merchants Ice & [458] Cold Storage Company belonging to the Pacific Empire Holdings, Incorporated and none of said defendants are indebted to Pacific Empire Holdings, Incorporated in any sum or in any amount, or at all.

XIV

Pacific Empire Corporation is not a necessary party to the determination of this action.

And as conclusions of law from the foregoing findings of fact:

CONCLUSIONS OF LAW

I

The plaintiff is not entitled to recover from the defendants, Peter Bercut, Henri Bercut, M. Maffei or L. R. Arnold, or all, either or any of them, any shares of the capital stock of Merchants Ice & Cold Storage Company, a California corporation, or any sum, or sums of money, or any other matter or thing.

II

That defendant, Peter Bercut, is entitled to judgment against plaintiff for the delivery of 308 $\frac{2}{3}$ shares of preferred stock and 3,522 shares of common stock of Merchants Ice & Cold Storage Company, and defendant, Henri Bercut, is entitled to judgment against plaintiff for the sum of \$3,850.00 and interest thereon.

III

That each and all of the parties hereto pay their own costs of suit herein incurred.

And it is Ordered and Directed that judgment be entered accordingly.

Dated: San Francisco, California,

August

July 9, 1943.

MICHAEL J. ROCHE

Judge

[Endorsed]: Filed Aug. 9, 1943. [459]

In the United States District Court for the Northern District of California, Southern Division

Civil Action—File No. 22339 W

THOMAS H. WINGATE, as Receiver in Equity for Pacific Empire Holdings, Incorporated, a corporation, of the State of Delaware,

Plaintiff,

vs.

PETER BERCUT, HENRI BERCUT, M. MAFFEI and L. R. ARNOLD,

Defendants.

JUDGMENT

The above entitled cause having been duly and regularly heard by the above entitled Court, without a jury, Honorable Michael J. Roche, presiding, a jury trial not having been demanded, and the cause having been argued and submitted, and the Court having rendered his opinion and having made findings of fact and conclusions of law, it is hereby Ordered, Adjudged and Decreed: [460]

I

That plaintiff take nothing by his complaint on file herein. Plaintiff is not entitled to recover from the defendants, Peter Bercut, Henri Bercut, M. Maffei or L. R. Arnold, or all, either, or any of them, any shares of the capital stock of Merchants Ice & Cold Storage Company, a California corporation, or any sum or sums of money, or any other matter or thing.

II

That the defendant, Peter Bercut, have judgment against plaintiff for the delivery of 308 $\frac{2}{3}$ shares of preferred stock and 3,522 shares of common stock of Merchants Ice & Cold Storage Company, a California corporation, and defendant, Henri Bercut, have judgment against plaintiff for the sum of \$3,850.00 and interest from date hereof thereon.

III

That each and all of the parties hereto pay their own costs of suit herein incurred.

And the Clerk of the above entitled Court is Ordered and Directed to enter said judgment.

August

Dated: ~~July 9th~~, 1943.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Aug. 9, 1943. [461]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR REHEARING
AND NEW TRIAL

To Louis H. Brownstone and George M. Naus,
Attorneys for Defendants, Peter Bercut and
Henri Bercut; and to J. A. Paradini, Attorney
for Defendants, M. Maffei and L. R. Arnold:

Please Take Notice, and you are hereby notified that the undersigned attorneys for the plaintiff above named will move the above entitled Court before the Honorable Michael J. Roche, judge thereof, in his courtroom at Room No. 307 Post Office Building, Seventh and Mission Streets, San Francisco, California, on Monday, the 9th day of August, 1943, at ten o'clock A. M. thereof, or as soon thereafter as counsel may be heard, for an order setting aside the decision and judgment herein and granting a new trial of the above entitled cause, for the following reasons, viz:

1. The decision is contrary to the law in the case.
2. The decision is contrary to the evidence in the case. [462] •
3. The decision is contrary to the law and the evidence in the case.
4. Insufficiency of the evidence to justify the decision herein.

At said time and place plaintiff will further move the Court to set aside and vacate its decision herein and to enter judgment herein in favor of plaintiff on the Findings of Fact and Conclusions of Law submitted and filed herewith by plaintiff.

Said motions will be made and based upon this Notice of Motion, the stenographic report of the evidence, all exhibits admitted into evidence and the minutes, records, pleadings and files of the above entitled Court in the above entitled matter.

Dated: San Francisco, California.

July 22, 1943.

A. J. SCAMPINI

L. F. MAHAN

ELIIS & STEINDORF

C. T. HUBNER

IVAN CULBERTSON

Attorneys for Plaintiff.

[Endorsed]: Filed July 23, 1943. [463]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern
District of California, held at the Court Room
thereof, in the City and County of San Francisco,
on Monday, the 9th day of August, in the year of
our Lord one thousand nine hundred and forty-
three.

Present: the Honorable Michael J. Roche, D. J.

No. 22339-R Civil

THOMAS H. WINGATE, etc.

vs.

PETER BERCUT, et al.

This case came on regularly this day for hearing
on motion to settle findings and motion for rehear-
ing and new trial.

After hearing the arguments of A. J. Scampini, Esq. for plaintiff, and George M. Naus, Esq. for defendants, it is Ordered that the motion for rehearing and new trial be denied. Further Ordered that the findings of fact and conclusions of law proposed by the defendants be approved, and that judgment be entered in favor of defendants in the form this day signed and filed. [464]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE
CIRCUIT COURT OF APPEALS

To the defendants Peter Bercut and Henri Bercut,
and to Louis H. Brownstone, Esq. and George
M. Naus, Esq., their attorneys:

To the defendants M. Maffei and L. R. Arnold, and
to Messrs. J. A. Pardini and Elda Granelli,
their attorneys; and

To all persons interested:

Notice is hereby given that Thomas H. Wingate, as receiver in equity for Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, the plaintiff above named, hereby appeals [465] to the Circuit Court of Appeals of the Ninth Circuit from the final judgment in this action by the above entitled court on August 9, 1943, in favor of the defendants Peter Bercut, Henri Bercut, M.

Maffei and L. R. Arnold, and against the plaintiff, and from the whole of said judgment.

Dated: San Francisco, California, August 13, 1943.

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

C. T. HUBNER

IVAN CULBERTSON

Attorneys for Plaintiff
300 Montgomery Street,
San Francisco, California

(Receipt of Service.)

[Endorsed]: Filed Aug. 13, 1943. [466]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD TO BE CONTAINED IN RECORD ON APPEAL.

To the Clerk of the above entitled Court:

The above named plaintiff, appellant herein, designates the following portions of the record to be contained in the record on appeal in the above entitled action:

1. Complaint.
2. Answer of Peter Bercut, Ernest E. Bercut, Henri Bercut and Jean Bercut.
3. Answer of M. Maffei and L. R. Arnold.

4. Stipulation of the parties permitting the use of certain depositions. [467]
5. Plaintiff's request for admission of certain facts, under rule 36, and plaintiff's interrogatories propounded to the defendant Peter Bercut.
6. Reply of Peter Bercut to said request for admission of facts and answer of Peter Bercut to said propounded interrogatories.
7. The amended answer and counter claim filed in said cause by Peter Bercut and Henri Bercut, et al.
8. The minute order of the court, dated July 6, 1943, directing entry of judgment for the defendants upon Findings of Fact and Conclusions of Law.
9. The Findings of Fact and Conclusions of Law proposed in said cause by the defendants Peter Bercut and Henri Bercut.
10. The exceptions to said proposed Findings of Fact and Conclusions of Law filed in said cause by the Plaintiff.
11. The Findings of Fact and Conclusions of Law proposed by the plaintiff in said cause.
12. Plaintiff's motion for a new trial and rehearing.
13. Minute order of the court denying motion for new trial and rehearing.
14. The Findings of Fact and Conclusions of Law settled by the court.
15. The judgment entered in said cause by the court.

16. The Notice of Appeal.
17. Designation of Portions of the Record to be contained in record on appeal.
18. Designation by the appellee of additional matter to be included in the record.
19. Reporter's Transcript of the evidence.

Dated: San Francisco, California, August 13, 1943.

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

C. T. HUBNER

IVAN CULBERTSON

Attorneys for Plaintiff

[Endorsed]: Filed Aug. 13, 1943. [468]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF THE
RECORD ON APPEAL

To the Clerk of the above entitled court:

The above named plaintiff, appellant herein, does hereby amend his designation of portions of the record to be contained in the record on appeal filed by him in the above cause on August 13, 1943, and does hereby now designate for inclusion therein the complete record and all the proceedings and evidence in the action, including all exhibits admitted into evidence, and the depositions of Lloyd R. Arnold and Leona Keener.

Dated: San Francisco, California, August 17, 1943.

A. J. SCAMPINI
L. F. MAHAN
ELLIS & STEINDORF
C. T. HUBNER
IVAN CULBERTSON

Attorneys for Plaintiff

[Endorsed]: Filed Aug. 18, 1943. [469]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

The appellant states that the points upon which he intends to rely on the appeal in this action are as follows:

1. The judgment of the trial court is contrary to the law of the case.
2. The judgment of the trial court is contrary to the evidence of the case.
3. The findings of the trial court are contrary to the evidence of the case.
4. The findings of the trial court are not supported by any evidence in the record.
5. The conclusions of law of the trial court are erroneous in law. [470]
6. The conclusions of law of the trial court are

not warranted or supported either by any evidence in the record or by any proper finding.

7. Finding numbered III of the trial court is contrary to the evidence in that the evidence adduced at the trial conclusively discloses that the defendant Peter Bercut was a director, vice president and member of the executive committee of Pacific Empire Holdings, Incorporated, until August 20, 1942, and that the said defendant, together with the defendants M. Maffei and L. R. Arnold, actively managed, supervised and conducted the affairs of said corporation and of its subsidiaries from on or about 1933 to on or about January 8, 1941. The evidence conclusively discloses that defendant Peter Bercut, in all matters and things of any substantial nature appertaining to the conduct of the affairs and business of said corporation and of its subsidiaries, Pacific Empire Corporation, Merchants Ice and Cold Storage Company, and California Pacific Service, Inc., was consulted by the defendants M. Maffei and L. R. Arnold and he participated in the directors and executive committee meetings and approved, without objection, all of the acts and deeds of M. Maffei and L. R. Arnold and of said executive committee during all of said period of time. The evidence further conclusively discloses that said defendant Peter Bercut at no time ever resigned as an officer and director of Pacific Empire Corporation and as a director of Merchants Ice and Cold Storage Company, both of these companies being subsidiaries of Pacific

Empire Holdings, Incorporated. The evidence further discloses that said defendant Peter Bercut, together with the defendants M. Maffei and L. R. Arnold, as the executive officers of Pacific Empire Holdings, Incorporated, and constituting its executive committee, prepared and supervised all financial statements and reports of said corporation mailed to its stockholders during all of said period. [471]

8. Finding numbered IV of the trial court is contrary to and not supported by any evidence in the record insofar as it finds that on or about January 8, 1941, the 12,493 shares of preferred and 65,863 shares of common capital stock of Merchants Ice and Cold Storage Company owned by Pacific Empire Holdings, Incorporated, was of the reasonable value of not more than \$35,000 and no portion of said shares were then on pledge with Pacific Empire Corporation as security for moneys owing by Pacific Empire Holdings, Incorporated to Pacific Empire Corporation for the reason that,

(a) the evidence in the record conclusively shows that the reasonable value of the 12,493 shares of preferred and the 65,863 shares of common capital stock owned by Pacific Empire Holdings, Incorporated, on January 8, 1941, was then not less than \$250,000;

(b) the evidence in the record conclusively shows that on January 8, 1941, 3,990 shares of preferred and 44,944 $\frac{1}{3}$ shares of common of said capital stock had been and was on pledge

with Pacific Empire Corporation, a California corporation, and then a subsidiary of Pacific Empire Holdings, Incorporated, by virtue of a pledge agreement executed between said corporations on May 15, 1935, by and with the written consent and approval of the defendants Peter Bercut, M. Maffei and L. R. Arnold, who, respectively, were on May 15, 1935, and on January 8, 1941, officers and directors of both corporations.

9. Finding numbered V of the trial court is contrary to the evidence and not supported by any evidence in the record in that the record discloses that on January 8, 1941, Pacific Empire [472] Holdings, Incorporated, had a board of directors consisting of M. Maffei, A. A. Heer, Jr., L. R. Arnold, Luigi Giachino, Webb Richards and R. M. Ryerson, and the defendant Peter Bercut, and an executive committee of three directors, namely, the defendants M. Maffei, L. R. Arnold and Peter Bercut.

10. Finding numbered VII of the trial court is contrary to and not supported by any evidence in the record in that the evidence and the record conclusively show that the defendants M. Maffei and L. R. Arnold, on January 8, 1941, were not acting within the course and scope of their authority for and on behalf of Pacific Empire Holdings, Incorporated, in selling to Peter Bercut for the sum of \$35,000 the 12,493 shares of preferred and 65,863 shares of common stock of Merchants Ice and Cold

Storage Company owned by Pacific Empire Holdings, Incorporated, on that date. The record and evidence further conclusively show that in said transaction the defendants M. Maffei and L. R. Arnold were acting without authority to do so, with the knowledge of the defendant Peter Bercut, who on said day was also an officer and director of Pacific Empire Holdings, Incorporated and a member of its executive committee and knew that said defendants M. Maffei and L. R. Arnold had no authority to enter into said transaction for and on behalf of Pacific Empire Holdings, Incorporated. The record and the evidence further conclusively show that the agreement of sale dated January 8, 1941, purported to have been entered into by and between Pacific Empire Holdings, Incorporated, acting through the defendants M. Maffei and L. R. Arnold and the defendant Peter Bercut, was unfair and inequitable to Pacific Empire Holdings, Incorporated, in that the reasonable value of said shares of stock on said day was not less than \$250,000, and in that no effort was made by the officers of the corporation to obtain a higher price than that offered by defendant Peter Bercut for said [473] block of stock and in that the directors of said corporation, other than the defendants M. Maffei, L. R. Arnold and Peter Bercut, were kept in ignorance of said negotiations and said transactions, and the stockholders of said corporation were kept in ignorance of said negotiations and said transactions and in that no meeting of

either the executive committee or of the board of directors or of the stockholders of said corporation was ever called or held for the purpose of authorizing or approving or ratifying the said transaction. The record and the evidence further conclusively show that said transaction was not entered into in good faith or after lengthy negotiations between said parties, but on the contrary was entered into hastily, secretly and for an unfair consideration and for the purpose of avoiding and defrauding the rights of the creditors of Pacific Empire Holdings, Incorporated, including the United States of America, which had obtained a judgment on or about November 20, 1940, against Pacific Empire Holdings, Incorporated and which judgment was and still is unsatisfied. The record and the evidence conclusively show that no disclosure of the facts and circumstances of said transaction was ever made by the defendant Peter Bercut, L. R. Arnold or M. Maffei to the board of directors of Pacific Empire Holdings, Incorporated, until on or about August 20, 1942, at which time and for the first time since January 8, 1941, a meeting of the board of directors of said corporation was called and held and at said meeting the said transaction was disaffirmed by said board of directors pursuant to its rights reserved in and by virtue of Section 2 of Article VII of the By-Laws in evidence. The record and the evidence further conclusively show that the defendants Peter Bercut, M. Maffei and L. R. Arnold, in the course of said negotiations and

at the time of the completion of said transaction on January 8, 1941, were not disinterested officers [474] or directors of Pacific Empire Holdings, Incorporated, but on the contrary were interested personally and individually in said transaction and had an adverse interest to Pacific Empire Holdings, Incorporated.

The record and evidence in the case further conclusively show that the said transaction of January 8, 1941 was entered into in violation of sections 311,343 and 3439.04 and 3439.07 of the Civil Code of California, and section 65 of the Delaware Corporation Laws then in force and effect.

11. Finding numbered VIII of the trial court is contrary to the evidence in that the evidence and record conclusively show that Pacific Empire Holdings, Incorporated, did not receive the sum of \$35,000 for said shares, but on the contrary received the sum of approximately \$4,000.

12. Finding numbered IX of the trial court is contrary to and not supported by any evidence in the record for the reason that the evidence conclusively shows that as a direct and proximate result of the said transaction had by and between the said defendants M. Maffei, L. R. Arnold and Peter Ber-cut on January 8, 1941, Pacific Empire Holdings, Incorporated, was rendered insolvent and unable to meet its obligations.

13. Finding numbered X of the trial court is contrary to and not supported by any evidence in the record in that the record and the evidence conclusively show that on January 8, 1941, and prior

thereto and thereafter, Merchants Ice and Cold Storage Company was in a solvent condition and a going concern with a net book worth of \$1,415,725.00; that it had at all times met its obligations when due; that it had never defaulted in any of its obligations and that the business of said corporation had shown an increase, in the year 1940, over previous years, and that the value of the outstanding [475] capital stock of said corporation was higher on January 8, 1941 than it had ever been at any time prior thereto for some years.

The record and the evidence further conclusively show that the facts and circumstances relating to the purported purchase and sale of the said shares of Merchants Ice and Cold Storage Company owned by Pacific Empire Holdings, Incorporated, by Peter Bercut were at no time known to any of the officers of directors of Pacific Empire Holdings, Incorporated, other than the defendants L. R. Arnold, M. Maffei and Peter Bercut, until August 20, 1942. The record and the evidence further conclusively show that the sum of \$33,000 paid for said shares by Peter Bercut was not a fair, reasonable and proper price for said shares for the reason that said shares had a reasonable value on January 8, 1941 of not less than \$250,000. The record and the evidence further conclusively show that the facts and circumstances of said transaction were wilfully suppressed by the defendants M. Maffei, L. R. Arnold and Peter Bercut from the stockholders and creditors of Pacific Empire Holdings, Inc. The rec-

ord and the evidence conclusively show that the directors of Pacific Empire Holdings, Inc., (other than the defendants M. Maffei, L. R. Arnold and Peter Bercut) and plaintiff acted promptly in disaffirming the said transaction when all of the facts and circumstances thereof were brought to their knowledge, and at no time have they or the stockholders or creditors or Pacific Empire Holdings, Inc. ever acquiesced in or consented or approved or ratified or confirmed the said transaction, either formally or informally, or by reason of any act or conduct on their part.

13. Findings numbered XII and XIII of the trial court are contrary to the evidence and the record and the law of the case [476] in that the defendants Peter Bercut and Henri Bercut are not lawfully in possession of the shares of Merchants Ice and Cold Storage Company delivered to Peter Bercut pursuant to the agreement dated January 8, 1941, and said defendants, together with the defendants M. Maffei and L. R. Arnold, unlawfully converted the said shares to their own use and benefit, for the reasons that

(a) the transaction purported to have been entered into by and between M. Maffei, as president, and L. R. Arnold, as secretary, of Pacific Empire Holdings, Incorporated, and Peter Bercut, on January 8, 1941, wherein and whereby the said shares of Merchants Ice and Cold Storage Company were delivered to and received by the defendant Peter Bercut, was not a valid, corporate act of Pacific

Empire Holdings, Incorporated, or binding upon it or plaintiff herein;

(b) said M. Maffei, as president, and L. R. Arnold, as secretary, of Pacific Empire Holdings, Incorporated, had no authority for and on behalf and in the name of said corporation to enter into said transaction, and each of them lacked proper authority to do so or to affix the corporate seal to said document, and such lack of authority was known to Peter Bercut;

(c) said transaction was not authorized, ratified, approved or confirmed by the executive committee or the board of directors or the stockholders of Pacific Empire Holdings, Incorporated;

(d) said transaction was disaffirmed by the board of directors of Pacific Empire Holdings, Incorporated, and plaintiff herein, promptly upon the facts and circumstances of said transaction having been brought to their attention.

(e) at the time of the said transaction the defendants M. Maffei, L. R. Arnold and Peter Bercut were officers and directors [477] of Pacific Empire Holdings, Incorporated, and constituted its Executive Committee, and the said transaction was unfair and inequitable to Pacific Empire Holdings, Incorporated, and entered into by said parties hastily, secretly and without adequate consideration being received by Pacific Empire Holdings, Incorporated, and without the facts and circumstances thereof being, either before or thereafter, until August 20,

1942, fully disclosed to the directors or stockholders of Pacific Empire Holdings, Incorporated.

(f) the said transaction was entered into in violation of the fiduciary obligations then and there owing to Pacific Empire Holdings, Incorporated, by the defendants M. Maffei, L. R. Arnold and Peter Bercut.

(g) the said transaction was entered into in violation of Sections 311, 343, 3439.04 and 3430.07 of the Civil Code of the State of California, and Section 65 of the Delaware corporation laws then in force and effect.

(h) the said transaction constituted a fraud upon the creditors and stockholders of Pacific Empire Holdings, Incorporated and was entered into by the said defendants M. Maffei, L. R. Arnold and Peter Bercut wilfully and with intent to hinder, defraud and delay the creditors of Pacific Empire Holdings, Incorporated.

(i) the said transaction constituted fraud upon Pacific Empire Holdings, Incorporated.

(j) at said time, to-wit, January 8, 1941, the said defendants M. Maffei, L. R. Arnold and Peter Bercut were trustees of Pacific Empire Holdings, Incorporated, and said transaction was entered into in violation of their trustees' obligation and in violation of Sections 2223, 2224, 2228, 2229, 2230, 2231, 2233 and 2234 of the Civil Code of the State of California. [478]

(k) plaintiff and Pacific Empire Holdings, In-

corporated, are not estopped either by laches or limitations from repudiating the said transaction by reason of the acts and conduct of the said defendants M. Maffei, L. R. Arnold and Peter Bercut in suppressing the facts and circumstances of said transaction from the directors, creditors and stockholders of Pacific Empire Holdings, Incorporated, until on or about August 20, 1942.

(1) the said transaction was promptly and seasonably repudiated and rescinded by plaintiff and the board of directors of Pacific Empire Holdings, Incorporated, when all of the facts and circumstances thereof were made known to them, and plaintiff, as receiver of Pacific Empire Holdings, Incorporated, did promptly offer to restore to the defendant Peter Bercut any and all consideration paid by him to Pacific Empire Holdings, Incorporated, as the result of said transaction, prior to the institution of the above entitled action and again in open court during the trial thereof.

14. The conclusions of law of the trial court are erroneous in law, contrary to the law and equity of the case, and not warranted by any proper finding, in that the proper findings of the case warranted by and consistent with the evidence in the case are the findings of fact proposed to the trial court by the plaintiff, which findings were refused by the trial court.

15. Plaintiff is entitled, under the evidence in the record and the law of the case to a judgment

against the defendants Peter Bercut and Henri Bercut for the return of all the shares of common and preferred stock of Merchants Ice and Cold Storage Company delivered to Peter Bercut by the defendants M. Maffei and L. R. Arnold as the result of the transaction between said parties dated January 8, 1941, for the reason that said transaction [479] (as stated in point 13 hereof) was and is void as to Pacific Empire Holdings, Incorporated, and plaintiff.

16. The defendants Peter Bercut and Henri Bercut, by reason of their conduct in the premises, are not entitled to any affirmative judgment or relief against the plaintiff of any kind or character.

17. The judgment of the trial court should be reversed and the trial court directed to enter judgment in said cause against the defendants Peter Bercut, Henri Bercut, M. Maffei and L. R. Arnold.

(a) for the return to plaintiff of all shares of common and preferred stock of Merchants Ice and Cold Storage Company received by either of them as the result of the transaction between said parties dated January 8, 1941; and

(b) each of said defendants should be ordered to account for and pay over to plaintiff any profits earned or made by them, directly or indirectly, as the result of said transaction;

(c) and ordered to pay to plaintiff all proper costs incurred by plaintiff in this action.

Dated: San Francisco, California, August 19, 1943.

Respectfully submitted,

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

C. T. HUBNER

IVAN CULBERTSON

Attorneys for Appellants.

Receipt of Service.

[Endorsed]: Filed Aug. 19, 1943. [480]

[Title of District Court and Cause.]

STIPULATION AUTHORIZING USE OF
EXHIBITS ON APPEAL IN ORIGINAL
FORM

The above named plaintiff having duly filed in the above entitled cause his notice of appeal to the Circuit Court of Appeal, Ninth Circuit, from the judgment rendered by the above entitled Court on August 9, 1943, in favor of the defendants, and having designated for inclusion in the record of appeal the complete record and all the proceedings and evidence in the action, including all exhibits; and all depositions admitted into evidence;

It is hereby stipulated that all exhibits whether marked for identification or introduced in evidence, have been and are designated for inclusion in the record on appeal herein.

It is further stipulated that all exhibits in said cause may be sent to the Appellate Court in their original form in lieu of copies, and that the depositions of Lloyd R. Arnold and Leona Keener may be sent to the Appellate Court in their original form instead of copies.

It is further stipulated that the original deposition of A. A. Heer, filed by the plaintiff in said cause but not read or admitted into evidence at the trial of said cause, shall remain with the Clerk of the above Court until the further order of the Court and shall not be sent to the Appellate Court as part of said record on appeal.

It is further stipulated that the briefs filed in said cause by the plaintiff and the defendants shall not be deemed to be a part of the record on appeal to be sent to the Appellate Court. [481]

Dated: San Francisco, California, August 20th, 1943.

L. F. MAHAN
ELLIS & STEINDORF
IVAN CULBERTSON
CONRAD T. HUNTER
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Lloyd R. Arnold and M. Maffei

LOUIS H. BROWNSTONE

GEORGE M. NAUS

Attorneys for Defendants,

Peter Bercut and Henri Bercut

ORDER

The above stipulation is hereby approved and it is so ordered.

A. F. ST. SURE

Judge of the District Court

[Endorsed]: Filed Aug. 24, 1943. [482]

District Court of the United States

Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 482 pages, numbered from 1 to 482, inclusive, together with two volumes of depositions, contain a full, true, and correct transcript of the records and proceedings in the case of Thomas H. Wingate, etc., plaintiff, vs. Peter Bercut, et al., No. 22339-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Forty-one dollars and seventy-

five cents (\$41.75) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 11th day of September, A .D. 1943.

[Seal]

C. W. CALBREATH,
Clerk,
WM. J. CROSBY,
Deputy Clerk. [483]

[Endorsed]: No. 10550. United States Circuit Court of Appeals for the Ninth Circuit. Thomas H. Wingate, as receiver in equity for Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, Appellant, vs. Peter Bercut, Henri Bercut, M. Maffei and L. R. Arnold, Appellees. Transcript of Record upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 13, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10550

In the United States Circuit Court of Appeals
for the Ninth Circuit

THOMAS H. WINGATE, as Receiver in Equity
for Pacific Empire Holdings, Incorporated, a
corporation of the State of Delaware,

Appellant,

vs.

PETER BER CUT, HENRI BER CUT,

M. MAFFEI, L. R. ARNOLD, et al.,

Appellees.

APPELLANT'S DESIGNATION OF RECORD
TO BE PRINTED

The above named appellant does hereby designate for printing, in its entirety, the record of the above entitled cause as certified by the clerk of the United States District Court for the Northern District of California, Southern Division, including the following particular exhibits admitted into evidence, namely:

Plaintiff's Exhibits 1, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 28, 29, 30, 31, 32, 33, 34, 35 and 38, omitting all other exhibits.

Dated: San Francisco, California, September 20, 1943.

A. J. SCAMPINI

L. F. MAHAN

ELLIS & STEINDORF

CONRAD T. HUBNER

Attorneys for Appellant

IVAN CULBERTSON

Of Counsel

Receipt of service.

[Endorsed]: Filed Sep. 22, 1943. Paul P. O'Brien,
Clerk.

[Title of Circuit Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF RECORD TO BE PRINTED

Comes now appellees, Peter Bercut and Henri Bercut, and do hereby designate for printing the following additional portions of the record herein, namely:

- (1) Plaintiff's and Appellant's Exhibit 7;
- (2) Defendants' and Appellees, Peter Bercut and Henri Bercut, Exhibits A, B, C, D, E, F, G, I, J, K and M.

Dated: San Francisco, California, September 30th, 1943.

LOUIS H. BROWNSTONE
GEORGE M. NAUS

Receipt of service.

[Endorsed]: Filed Oct. 1, 1943. Paul P. O'Brien,
Clerk.

No. 10,550

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

THOMAS H. WINGATE, as Receiver in Equity
for Pacific Empire Holdings, Incorporated (a corporation of the State of Delaware),

Appellant,

vs.

PETER BERCUT, HENRI BERCUT, M. MAFFEI
and L. R. ARNOLD,

Appellees.

APPELLANT'S OPENING BRIEF.

A. J. SCAMPINI,

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FILED

JAN 7 - 1944

PAUL P. O'BRIEN,
CLERK

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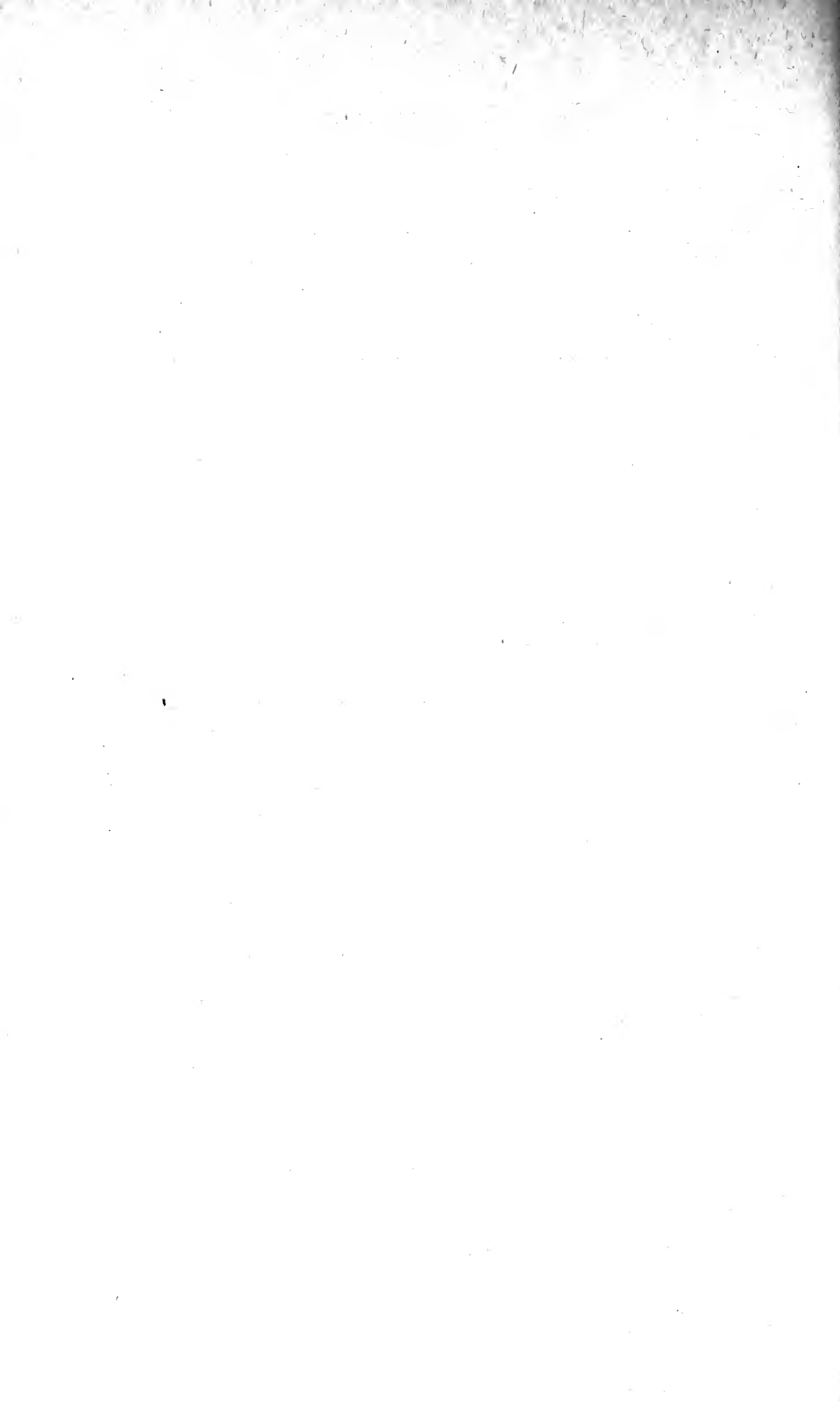
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No. 10,550

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS H. WINGATE, as Receiver in Equity
for Pacific Empire Holdings, Incorporated
(a corporation of the State of Delaware),

Appellant,

vs.

PETER BERECUT, HENRI BERECUT, M. MAFFEI
and L. R. ARNOLD,

Appellees.

APPELLANT'S OPENING BRIEF.

Part I.

INTRODUCTORY STATEMENT.

This is an appeal from a judgment of the United States District Court for the Northern District of California, Southern Division, denying to plaintiff any of the relief sought by his complaint and awarding judgment in favor of the defendants Peter Bercut and Henri Bercut against plaintiff for the delivery of 308 $\frac{2}{3}$ shares of preferred and 3522 shares of common stock of Merchants Ice and Cold Storage Company, a California corporation, and the payment of \$3850.

The action is brought by the Receiver in Equity of Pacific Empire Holdings, Inc., a Delaware corporation.

The defendants Peter Bercut, L. R. Arnold and M. Maffei, are alleged to have been the managing officers and directors of Pacific Empire Holdings, Inc., and of its subsidiaries, Pacific Empire Corporation, Merchants Ice and Cold Storage Company, and California Pacific Service, Inc. at the time of the purported transfer of personal property hereinafter referred to, and defendants Peter Bercut and Henri Bercut are the transferees of the property involved in the suit.

Plaintiff contends that the pleadings and evidence of the case warrant only a judgment in favor of plaintiff as prayed for in plaintiff's complaint, and by this appeal it is sought to obtain from this Honorable Court a judgment reversing the decision of the trial Court and directing it to enter judgment in favor of plaintiff as prayed for in plaintiff's complaint.

The suit is maintained in a representative capacity for the benefit and protection of Pacific Empire Holdings, Inc., its stockholders and creditors, under and pursuant to the authority vested in the Receiver by Section 4408 of the Revised Code of Delaware of 1935.

Part II.
JURISDICTION.

The jurisdiction of the Court over the cause is based upon diversity of citizenship. The amount in controversy exceeds \$3000. The jurisdictional facts appear on the face of the record. (Complaint: opening allegations and paragraphs I, II and III of first cause of action, R. 2; Finding I of trial Court, R. 941.)

The right of plaintiff to maintain the action is an admitted fact of the case (R. 294) and so found in finding II of the trial Court. (R. 941.)

The original jurisdiction of the District Court is sustained by 28 U. S. C. A. 41 (1).

This Court has jurisdiction on appeal under 28 U. S. C. A. 225 (a), (d). Appeal was taken within the period of three months allowed by 28 U. S. C. A. 230. Judgment was entered August 9, 1943. (R. 956.) The order denying motion for rehearing and new trial is dated August 9, 1943. (R. 959.) Notice of Appeal was filed August 13, 1943. (R. 960.) The time did not expire until November 8, 1943. (28 U. S. C. A. 230.)

Part III.

A BRIEF STATEMENT OF THE FACTS OF THE CASE AS DISCLOSED BY THE TRANSCRIPT OF RECORD.

For the purpose of brevity and clarity, hereafter in this brief, Pacific Empire Holdings, Inc. (a Delaware corporation) will sometimes be referred to as "Holding Company"; Pacific Empire Corporation (a California corporation) will sometimes be referred to as "Empire Corp."; Merchants Ice and Cold Storage Company (a California corporation) will sometimes be referred to as "Merchants Ice"; and California Pacific Service, Inc. (a California corporation) will sometimes be referred to as "Pacific Service".

- (a) Corporate structure, activities of and control over Pacific Empire Holdings, Inc. and its subsidiaries.

Pacific Empire Holdings, Inc. was originally incorporated under the laws of the State of Delaware under the name of Associated Calitalo Holdings, Ltd., Inc., and thereafter by amendment to its certificate of incorporation duly made in accordance with the law its corporate name was changed to Pacific Empire Holdings, Inc. (R. 65-66.) On January 8, 1941, it had outstanding 2,500,000 shares of common stock owned by approximately 10,000 stockholders. (R. 66.) Its principal activities have at all times been conducted in California.

As implied by its name it functioned as a holding company. (R. 763.) Over a period of years, beginning with about 1930 it acquired the controlling interest in the following corporations: (a) Merchants Ice and Cold Storage Company, a California public utility corporation operating a cold storage and ice manufacturing plant in San Francisco; (b) Pacific Empire Corporation, a California corporation, an investment company which in turn owned a substantial interest

in the Pacific National Bank of San Francisco, a national bank; (c) California Pacific Service, Inc., a California corporation, owning and operating "The Family Service Laundry" in Bakersfield, California.

On January 8, 1941, Pacific Empire Holdings, Inc. owned 65,863 shares of common (out of a total of 107,180 shares of common stock outstanding) and 12,493 shares of preferred (out of a total of 41,615 shares of preferred stock outstanding) of Merchants Ice. It is alleged in the complaint that the reasonable value of this block of common and preferred shares, on January 8, 1941, was and is now not less than \$1,000,000.

On January 8, 1941, Pacific Empire Holdings, Inc. also owned approximately 52% of the outstanding stock of Pacific Empire Corporation. The remaining 48% of the outstanding stock of Empire Corp. was owned by approximately 500 stockholders.

On January 8, 1941, it also owned approximately 47½% of the outstanding stock of California Pacific Service, Inc. and the balance of the outstanding stock of this corporation was then owned 47½% by Joseph I. McInerney and 5% by the public. (R. 189.)

In order to insure that control over Pacific Empire Holdings, Inc. would always rest with them, a voting trust arrangement was set up in 1936 whereby defendants Maffei, Arnold, Bercut and the other then acting four directors became voting trustees. (See Pl. Ex. 20, R. 214-216.)

Control over Empire Corp. rested in the Holding Company. Nevertheless a general proxy was solicited

from the other 500 odd stockholders running for several years in favor of defendants Maffei, Arnold and Peter Bercut. (See 'Pl. Ex. 21, R. 218.)

Under Part I of the Appendix we have incorporated the pertinent sections of the by-laws of the Holding Company in force and effect on January 8, 1941.

(b) The financing and nursing of Merchants Ice by the Holding Company during the depression.

It is undisputed that the investment made by the Holding Company in Merchants Ice and Cold Storage Company was by far its largest single investment. The aggregate investment made by the Holding Company in the acquisition of said shares in Merchants Ice was about \$400,000. (See testimony of Maffei (R. 71); testimony of Arnold. (R. 865.) It constituted its principal asset. (R. 239; Pl. Ex. 15, R. 205, 206.)

Merchants Ice, like all other companies of this character, underwent a tremendous shrinkage in business as the result of the nationwide business depression prevailing from 1930 to 1937. (R. 511.)

Because it represented its largest single investment, offering the best promise for the future, the Holding Company concentrated all its efforts and finances towards saving Merchants Ice.

Accordingly, the Holding Company, beginning in 1935, began to lend large sums of money to Merchants Ice to be used for the purpose of meeting

the taxes, bond interest and principal maturities of the latter. (R. 94 and 724.)

In 1935 it loaned Merchants Ice \$50,000, which was borrowed by Pacific Empire Corporation from Joseph I. McInerney, and in turn reloaned to the Holding Company, which in turn loaned it to Merchants Ice. (See R. 94, 95; and Pl. Exs. 8 and 9, R. 95-105.)

To secure the loan made by Pacific Empire Corporation to the Holding Company, the latter pledged to the former 49,944 $\frac{1}{3}$ shares of common and 3990 shares of preferred of Merchants Ice and Cold Storage Company. (Pl. Ex. 10, R. 123 and Pl. Ex. 11, R. 128.)

Thereafter, from time to time, the Holding Company made further large advances to Merchants Ice, generally obtained by the Holding Company borrowing from Pacific Empire Corporation or from California Pacific Service, Inc., the laundry company. (Pl. Ex. 9, R. 114; also R. 165-166.) From time to time the Holding Company and Pacific Empire Corporation guaranteed the borrowing of Merchants Ice from Pacific National Bank of San Francisco. (See Pl. Ex. 12, R. 145, 151, 177.) In 1939 Empire Corp. was caused to sell 280 shares of its stock in Pacific National Bank of San Francisco to H. R. Gaither at \$125 a share. The funds were thereupon "borrowed" by the Holding Company and used "to help the Merchants Ice and Cold Storage Company". (See

testimony of Maffei, R. 190; see also Pl. Ex. 15, R. 205 at 207; also R. 164-165.)

In 1936 the Holding Company financed Globe Brewing Company, then a valuable tenant and customer of Merchants Ice, by investing approximately \$40,000 therein. This investment subsequently became worthless. (R. 113.)

In 1939 it financed Frostkraft Packing Corporation, also a valuable tenant and customer of Merchants Ice. (R. 170-171.)

In 1936 Merchants Ice had outstanding \$659,500 of 6½% first mortgage bonds which matured annually at the rate of about \$40,000 a year plus interest. Because of the tremendous shrinkage in its business, and other causes, it found it increasingly difficult to meet said maturities even with the financial help given to it by the Holding Company and Empire Corp. So in 1936 Merchants Ice went through a 77-B reorganization wherein and whereby the principal maturity on its outstanding bonds was deferred for a period of five years. (R. 142.)

At no time has Merchants Ice ever defaulted in the payment of any of its obligations or in meeting its bond maturities. (R. 512-513.)

On June 30, 1940, there was mailed to the stockholders of Pacific Empire Holding, Inc., the annual report for the year 1939. *Said report and balance sheets are Pl. Ex. 15, found at R. 205, and set forth in full under Part II of the Appendix to this brief.*

During all of these years the Holding Company made it a policy of buying on the market at the cheapest possible price all of the preferred and common stock of Merchants Ice offered for sale. (See testimony of Arnold, R. 879; and testimony of Maffei, R. 181-182; also R. 204.)

In 1934 the Holding Company purchased 700 shares of preferred of said stock for \$11,200 from W. H. Roussel, a director of Merchants Ice. (R. 879.) During 1938 the Holding Company purchased a total of 18,727½ shares of common and preferred. (R. 181.)

In 1939 the Holding Company purchased 5516⅔ shares of preferred of said stock from the estate of Wm. A. Sherman for \$7604.68. (R. 163.)

In the annual reports of the Holding Company sent to its stockholders for the years 1937 (R. 137); 1938 (R. 181); 1939 (R. 208) the ownership by the Holding Company of Merchants Ice stock—both common and preferred—showed a continuous increase. By December 31, 1939, the investment of the Holding Company in Merchants Ice was carried on its books at \$669,363.47, or practically 70% of all its assets. (See balance sheet, R. 210.)

(c) Aggravation of financial condition and looting of the Holding Company and its subsidiaries.

Beginning with 1937, the financial condition of the Holding Company and Empire Corp. became ever more acute. (R. 175.)

In 1938 it sold its subsidiary, Assured Thrift, (an insurance agency operating in Los Angeles) to Joseph I. McInerney for \$13,000. (R. 159.) It had "borrowed" all available assets of Empire Corp. (R. 175.) By December 31, 1939, the liabilities of the Holding Company had increased to over \$250,000, of which, among others, \$86,019.90 was owing to Empire Corp. (R. 182-183.) *It had "borrowed" all of the assets in the hands of L. R. Arnold, liquidating agent of City National Bank of San Francisco, a national bank in process of liquidation. These assets, aggregating \$59,373.60, were trust funds in the hands of the defendant Arnold which should have been distributed to the more than 500 stockholders of the dissolved bank. Instead, the Holding Company "borrowed" them for its own purposes* (R. 184-185), with the result that the stockholders of City National Bank of San Francisco, in lieu of the assets taken over by defendant Arnold for liquidation and distribution to them, received a worthless note of the Holding Company. (R. 186.)

By the end of 1939 the Holding Company was in arrear on its rent (for its sumptuous offices at 26 O'Farrell Street) to Kohler & Chase in the sum of \$11,637.82. (R. 186.)

On February 15, 1940, there was held the annual meeting of the stockholders of the Holding Company and the following seven directors were elected to serve for the ensuing year, viz.: M. Maffei, L. R. Arnold,

Peter Bercut, A. A. Heer, Jr., Luigi Gracchino, Webb Richards. (R. 182.) The directors on February 15, 1940 appointed M. Maffei, president; L. R. Arnold, vice president and secretary; Peter Bercut, vice president; and an executive committee, consisting of M. Maffei, L. R. Arnold and Peter Bercut. (R. 187.) At this meeting, the following resolution was also adopted, viz.:

“Upon motion duly made, seconded and carried, the vice president and secretary was authorized to use the title of Executive Vice President, which authorization in no way alters the authority of the office of vice president and secretary, in accordance with the provisions of the By-Laws.” (R. 187.)

On March 8, 1940, an executive committee meeting was held to authorize the sale of one-half of the shares owned by the Holding Company in Pacific Service (laundry company) to Joseph I. McInerney in settlement of the indebtedness of \$15,000 owing by the Holding Company to him. (R. 188.) Thus the Holding Company became a minority stockholder in Pacific Service. (R. 189.)

At this meeting there was also ratified the sale of 280 shares of Pacific National Bank of San Francisco made by Empire Corp. to H. R. Gaither for \$125 a share, and the “borrowing” by the Holding Company from Empire Corp. of the proceeds of the sale. (R. 190.) Defendant Maffei, on examination,

said the sale was caused to be made "to help Merchants Ice and Cold Storage Company." (R. 190.)

In the meantime defendant Arnold had managed to have himself elected during the year 1939 president of Merchants Ice (at a salary of \$600 a month, R. 227) and M. Maffei vice president. Mr. Bercut became a director of Merchants Ice at the same time. (R. 194.) Thereupon the "looting" of Merchants Ice began. The balance sheet of the Holding Company of December 31, 1939 (Pl. Ex. 15, R. 210) shows that on that date Merchants Ice was indebted to the Holding Company in the sum of \$13,636 for money advanced. (R. 198.) By the end of 1940 the Holding Company "owed" Merchants Ice \$32,899.24. (R. 519.) How was such skullduggery accomplished? The answer is supplied by witness Walter O. Plagemann, secretary of Merchants Ice. He testified, on direct examination (R. 520) as follows:

"Q. Whenever those individuals wanted any money they would go down to the Merchants Ice and Cold Storage Company and help themselves and shift the books around and charge it to this, that or the other?

A. Yes.

Q. That is the way they ran the Merchants Ice and Cold Storage Company?

A. Yes."

There is no proof or evidence that the Holding Company ever actually received any of the money

reported to have been ostensibly "borrowed" by it from Merchants Ice. The testimony given by witness Walter O. Plagemann, Secretary of Merchants Ice, on direct examination (R. 516-517) *would seem to indicate that the defendant Arnold, as president of Merchants Ice, had a habit of helping himself to the funds of the company—and then would direct to what account his "withdrawals" were to be charged.* This is corroborated by the defendant Peter Bercut, who, on direct examination, gave the following testimony (R. 350):

"Q. Did you find any indebtedness owing to the Merchants Ice and Cold Storage Company from Mr. Arnold?

A. Well, it took months to find out that there were some charges, that it was charged back to the company. That was all an accounting business.

Q. When your accountant got through, how much did you find that Mr. Arnold had drawn down from the Merchants Ice and Cold Storage Company?

A. Quite a lot of money, but I will leave that to the accountant.

Q. That was many thousands of dollars, was it not?

A. Yes.

Q. Mr. Arnold had taken that money for his personal account, hadn't he?

A. I don't know. When we found an interest charge to the Merchants, we promptly wrote a

letter to Mr. Arnold to see which Company would be charged with that amount.”

In this fashion the indebtedness of the Holding Company to Merchants Ice during the year 1940 was created, and as soon as it was created it constituted a violation of the trust Indenture entitling the trustee to foreclose unless remedied. (See Audit Report of Merchants Ice by John F. Forbes & Co., dated June 4, 1940, for the year ending Dec. 31, 1939, being Pl. Ex. 38, R. 521 at R. 533.) That is why the defendant Arnold stated, at page 733 of the Record, that towards the end of 1940 he was having trouble with the trustee under the bond indenture.

The financial situation of all these companies, then under the active management and supervision of the defendants Maffei, Arnold and Peter Bercut, became so acute that they began to rob “Paul to pay Peter.” By 1940 the Holding Company was more than \$15,000 in arrear on its rent to Kohler & Chase and payment having been demanded, the defendant Arnold went so far as to give a note of Merchants Ice in the sum of \$9500 to the Holding Company, which in turn endorsed it over to Kohler & Chase. (See testimony of Chase R. 256.) When the discounted note of Merchants Ice came due demand for payment was made on Merchants Ice—and it was then ascertained that the said discounted note of Merchants Ice was not “valid.” (R. 258.) It was, in fact, a

“dead” note. (R. 237.) So, Chase, discovering he had a worthless note of Merchants Ice as security, demanded additional security. Whereupon the defendant Arnold did not hesitate to pledge to Kohler & Chase all of the shares of Pacific Empire Corporation then owned by the Holding Company. (See R. 237.) Thereafter, the rent remaining unpaid, Kohler & Chase foreclosed the pledge and acquired the controlling interest in Empire Corp. But upon examining the portfolio of Empire Corp. they found no assets in the company. (See testimony of Chase, R. 238, 259.)

How the defendants Maffei, Arnold and Peter Bercut, ran, managed and supervised all of these companies was aptly described by defendant Maffei, on cross-examination, at page 295 of Record, where the following testimony was given:

“Q. Now, Mr. Maffei, as a matter of fact, in the handling of these various corporations,—the Pacific Empire Holdings, Inc., Pacific Empire Corporation, Merchants Ice & Cold Storage Company, and the Laundry Company, and so on,—you and Mr. Arnold took the cash that any of these corporations had on hand at any time and used it as you pleased for the use of any of the other corporations, didn't you?

A. That is right.”

The defendant Peter Bercut, of course, denies all responsibility for such horrible misconduct and we

quote his testimony so that the Court may have before it his reasons. At pages 327-328 of the Record, on cross-examination, he gave the following testimony:

“Q. During the latter part of 1940 the financial condition of Merchants Ice & Cold Storage Company, according to your counsel, became somewhat aggravated and acute, is that correct?

A. Mr. Arnold put through these reports, and they were so covered that it looked fairly good to the directors, and I was of the impression that it was at the time, but when I took my report to my office and had it analyzed by my accountant, he said, ‘This thing is not——’

Q. Not so good?

A. Not so good.

Q. When were you first told that by your accountant?

A. Well, from the time he first saw the report, he said that.

Q. In other words, you knew for two or three years?

A. Yes.

Q. Did you ever do anything to change it?

A. I was not managing it.

Q. I asked you, did you ever do anything to change it?

A. I wish I could have done it. I helped every time I was asked.

Q. I asked you, did you ever do anything as a director of the Merchants Ice & Cold Storage Company or the Holding Company or Pacific

Empire Corporation to bring about the change in that?

A. What could a director do? I did the best I knew, but I was not very much help; I was only one of seven directors.

Q. You and Mr. Maffei and Mr. Arnold for a period of years in fact had been running and managing the affairs of the Pacific Empire Holdings and Pacific Empire Corporation.

A. No.

Q. —and Merchants Ice & Cold Storage Company, weren't you?

A. No.

Q. How much did you have to do with it?

A. I signed in the book when they asked me every six months or so.

Q. In other words, wherever your signature appears in the minute book of the Pacific Empire Holdings as being present and approving the acts and deeds of the officers and directors you would say you were not there?

A. I am sorry to say I was not there.

Q. Would you say that you would sign the minutes as they brought them to you?

A. Yes.

Q. Did you read the minutes?

A. No.

Q. You signed without reading them?

A. I made a mistake, I admit.

Q. Did you do that all the time?

A. All the time.

Q. From the very beginning of your position in the company to the very end?

A. Practically, yes.

Q. In other words, you would approve whatever Mr. Arnold and Mr. Maffei did without ever looking into it?

A. Yes.

Q. That is how you performed your duties as director, is that right?

A. That is right. I am a very busy man."

(d) Judgment obtained by United States v. Pacific Empire Holdings, Inc.

With such an involved and hopeless financial condition facing these defendants, we come to November 20, 1940. On that day, in an action which had been initiated in 1938, in the United States District Court, Northern District of California, Southern Division, by the United States of America v. Pacific Empire Holdings, Inc. to collect approximately \$30,000 in alleged unpaid taxes (R. 168) judgment was rendered in favor of the United States against the Holding Company for \$11,942.80. In the balance sheet of the Holding Company of December 31, 1939, mailed to the stockholders of June 30, 1940 (Pl. Ex. 15—R. 205), no mention or provision was made for this liability. (R. 199.)

When this judgment was handed down it came as a "bombshell" to the defendants M. Maffei and L. R. Arnold. (R. 199.) And well they might be panicky—

for they had exhausted all of the assets of all of the companies under their control and management and nothing remained with which to pay this judgment, *other than the unpledged* common and preferred shares of Merchants Ice owned by the Holding Company. (R. 199.) (See also the testimony of Arnold, R. 725.)

The defendant Peter Bercut says he knew nothing of the financial involvement of the Holding Company at this time although he admits that he knew that sooner or later it would have to be "liquidated because", so he testified, "there was no income in the place". (R. 337.) Defendant Arnold testified he kept Bercut fully advised of the condition of all these companies. (R. 723.) But be that as it may, these defendants, who had, over a period of years, squandered and looted all of the assets of the companies under their supervision and were now attempting to sustain their house of cards by looting Merchants Ice (see testimony of Peter Bercut, R. 350), suddenly were faced with the imminent threat of losing their control over Merchants Ice through a levy to satisfy said judgment. So what do we observe?

(e) Negotiations for the sale of the Merchants Ice stock to Peter Bercut.

Some time in December, 1940, the defendant L. R. Arnold, in complete secrecy and without consulting any of the directors of the Holding Company or

any of its subsidiaries (R. 727) decided to approach the defendant Peter Bercut, (R. 728), a man possessed of considerable wealth (see testimony of Bercut, R. 318, and Pl. Ex. 19, R. 574), who could be expected to be able to swing some kind of a deal.

Following is a portion of the testimony with respect to the opening negotiations with Peter Bercut given by defendant L. R. Arnold on direct examination (R. 733 to 736):

“A. In other words, we were having some serious differences and difficulties in the board meetings, and we were exchanging letters with the trustee for the Merchants’ bond issue. Other conditions bringing this about were, when we consolidated—when the Merchants had consolidated its loans from the Anglo—we had previously changed our banking from the Anglo and the Bank of America under pressure to the Pacific National Bank, where we thought we would have ample credit. However, owing to the fact that the holding company also was obligated to the Pacific National the banking department later ruled that both loans were interlocking, and consequently that cut the line of credit of the Merchants just about in half. In fact, our situation so far as credit was concerned was so serious that we had to go out to finance companies and finance some of our paper.

Q. All right. What did you propose to Mr. Bercut?

A. The original discussions were along the lines of the holding company selling part of its stock—probably majority of its holdings.

Q. To whom?

A. To Mr. Bercut.

Q. For what price?

A. Well, we were mainly talking about lump sums, I believe. I think we started out with \$50,000, or something like that.

Q. For how many shares?

A. Well, I believe we owned at that time about—what was it? 69,000?

Q. 78,000, wasn't it? (Indicating document.)

A. 78,000—oh, wait a minute. I beg your pardon just a second. (Examining document.) Yes, 78,000 shares. That is both common and preferred.

Q. Well, how many shares did you propose to sell to Mr. Bercut?

A. Well, we proposed to sell a majority of our holdings; in other words, that we would have to step into a minority position.

Q. For what price?

A. Our first conversation was around \$50,000. We ended up—

Q. Never mind. Now, I am asking you the question, what did he say to you after you proposed it to him?

A. Well, he expressed interest. He was somewhat skeptical because of our condition first, but he—

Q. Whose condition?

A. Merchants.

one man on this whole board that they thought could run this plant.

Q. Who was that man?

A. He said Peter Bercut.

Q. Who was that director that made that statement?

A. Mr. Schinneller. He was representing a certain amount of bondholders.

Q. Wasn't Mr. Morris, former president of the Bank of America, chairman of the board of directors at this time?

A. Mr. Morris was not president of the Bank of America—I think he was vice-president.

Q. Whom did he represent on the board?

A. I have not finished my answer.

Q. Whom did he represent?

A. You were asking me the question when Mr. Arnold first spoke to me and I was going to tell you.

Q. All right, proceed.

A. He said at that time, he told me, 'You know, Mr. Schinneller made the remark at the last meeting' that I should be manager of the company, or something of that kind; so I said, 'I am very sorry he said that, because it is nothing for me; I am not looking for a job, I am not looking for anything; I am satisfied to be one of the directors. Then he said, 'We want to sell our stock, the majority stock or controlling stock', and I said, 'Well, I don't know if I am interested or not'. Well, he told me that he himself never made a success of it for fifteen years, and they could not make a success, and maybe

I could. And I said, 'What is your figure? What do you expect for it?'. And he said, '\$50,000'. And then negotiations stopped there, and I said, 'I will let you know'. Then he called me again, and I went there, and he said, 'Will you make an offer?'. And I made an offer of \$35,000, and I went away again. And he called me again, and then I came up and the third time that I came there was news that there was fraud in the butter or something of that kind; it was already in the estate, you know, and I heard about it, and I said, 'This looks like a bad mix-up; I am going to stay out of it'. And then he said he tried to settle the case himself so as to get me interested again, so he went down to the Bank of America and he offered to settle for \$38,000 if they gave him a long time to pay, a couple of thousand a month, in order to satisfy me. But anyway, I was not interested any more, so I went away for a whole month; I went to Los Angeles and I stayed there a whole month; and then I came back and made inquiry about how much the loss would be, and he told me it would be between \$30,000 and \$40,000, and I finally made an offer, and he took me down to the bank and gave me the stock and made the bill of sale and everything, and I thought that was all right, so I said, 'Now you have all these matters settled between yourself and Mr. Maffei, and I want to see Mr. Maffei and tell him', and he said he had a perfect right, and they were willing and they would go all through the negotiations that would be necessary.

Q. Did you see Mr. Maffei?

A. Yes.

Q. When Mr. Arnold first approached you he asked you for \$50,000?

A. Yes.

Q. For all of the stock or half the stock?

A. No, he told me all of the stock.

Q. 50,000 for all of the stock?

A. Yes.

Q. Are you sure?

A. Yes.

Q. Did he offer to sell you half of the stock for \$50,000?

A. No.

Q. Why weren't you willing to accept the suggestion that you become president of the Merchants Ice & Cold Storage Company?

A. My experience in business tells me unless you have control and you can't handle it without too much interference from people that have no experience, you cannot have success.

Q. When it was suggested that you become president, you would not be interested unless you had control of the Merchants Ice & Cold Storage Company; is that right?

A. Yes.

Q. When Mr. Arnold approached you to buy this control, you say he offered to sell to you for \$50,000 and you made him an offer?

A. Yes.

Q. How much did you offer?

A. \$35,000, I never changed.

Q. You, of course, felt when you were offering \$35,000 that you could not offer any more for that stock and make a good deal for Peter Bercut even at that?

A. In business dealings that I do I try to get the best price. Everybody advised me against it—my brother, my wife, my friends, even my attorney told me, ‘Stay away from this; you are looking for trouble; it is a bad mix-up’.

Q. *When you were negotiating with Mr. Arnold you were only interested in getting this block of stock at the least possible price that Mr. Bercut could get it for; is that right?*

A. *That is the way I do business.”*

Defendant M. Maffei testified as follows (R. 224-225):

“Q. Now, Mr. Maffei, this 65,683 shares of common stock and 12,495 shares of preferred stock, in the aggregate, were all of the shares owned by Pacific Empire Holdings, Inc., or any of its subsidiaries in Merchants Ice & Cold Storage Company?

A. Right.

Q. Who conducted this transaction with Mr. Bercut?

A. Mr. Arnold.

Q. What did you have to do with it?

A. Mr. Arnold was going to contact him and make a deal.

Q. Did you conduct negotiations with Mr. Bercut?

A. I talked to Mr. Bercut once in the office about three minutes, and that was all.

Q. At that time was Mr. Bercut a director and vice-president of Pacific Empire Holdings, Inc.?

A. Yes.

Q. Was he a director of Pacific Empire Corporation?

A. To my best knowledge he was.

Q. Was he a director of Merchants Ice & Cold Storage Company?

A. Yes.

Q. Was he a director of the Pacific National Bank?

A. That is right."

(f) The transaction with Peter Bercut of January 8, 1941.

On January 8, 1941, a purported agreement, in the form of a letter addressed by Pacific Empire Holdings, Inc. to Peter Bercut, was signed in the name of Pacific Empire Holdings, Inc., by M. Maffei and L. R. Arnold with the seal thereto affixed. (Pl. Ex. 22, R. 223.) It appears that said letter agreement, though signed in the name of the Holding Company, was never *actually signed* or executed by defendant Peter Bercut. (See P. Ex. 22, R. 222 and testimony of Peter Bercut at R. 348.) However, pursuant to said agreement there was delivered by defendants Maffei and Arnold, ostensibly acting in the name of the Holding Company as president and secretary thereof, to Peter Bercut all of the shares of Merchants Ice then owned

by the Holding Company consisting of 12,445 shares of preferred and 65,863 shares of common, for the aggregate sum of \$35,000, of which \$25,000 was immediately paid to Merchants Ice; about \$6000 to Pacific National Bank of San Francisco to apply on account of various obligations and \$4000 was received by the Holding Company. (Testimony of L. R. Arnold, R. 739; and testimony of M. Maffei, R. 225.) Upon the completion of this transaction the Holding Company and its subsidiary, Empire Corp. were devoid of all assets of any substance (testimony of Arnold, R. 725; testimony of Maffei, R. 225) and were left with liabilities of over \$300,000, *including an unsatisfied judgment due to the United States*, (Testimony of M. Maffei, R. 225), *and notes payable to L. R. Arnold as liquidating agent of City National Bank of San Francisco in excess of \$70,000.* (R. 743.)

Of the shares delivered to defendant Peter Bercut 49,944 $\frac{1}{3}$ shares of common and 3,990 shares of preferred had been pledged to Pacific Empire Corporation pursuant to the pledge agreement entered into between the Holding Company and Pacific Empire Corporation on May 15, 1935. (Pl. Ex. 10 and 11; R. 123-128.) Said pledge had never been satisfied or released. (R. 741.) On January 8, 1941, the Holding Company was indebted to Pacific Empire Corporation in a sum exceeding \$150,000. (Testimony of Arnold, R. 743.) Defendant Arnold says they all knew of this pledge agreement to Pacific Empire Corporation. (R.

740.) In fact the minutes of the directors meeting of the Holding Company, held May 8, 1935, and of Pacific Empire Corporation held on May 15, 1935, which meetings were held to authorize the borrowing by the Holding Company from Pacific Empire Corporation, and the pledging as security the said shares of Merchants Ice, show that they were approved in writing by these three defendants—Maffei, Arnold and Bercut. (See testimony of Arnold, R. 705 to 709.) *Nevertheless, the rights of Pacific Empire Corporation were completely forgotten in the transaction with Peter Bercut and the only assets to which Pacific Empire Corporation could look for repayment of the money "taken" from its treasury by the Holding Company, were removed from its portfolio without it even being asked or even receiving a cent of consideration.* (See testimony of Arnold, R. 740 and 741.)

Thus were approximately 10,000 stockholders of the Holding Company, and approximately 500 stockholders of Pacific Empire Corporation, and the stockholders of City National Bank in course of liquidation, and the creditors of these companies, including the United States of America, defrauded of their property.

(g) Unfairness of the transaction to Holding Company and inadequacy of the consideration.

The evidence, as disclosed by the transcript of record, with respect to the financial condition of Merchants Ice on or about January 8, 1941, and the rea-

sonable value of the block of shares delivered on that day to defendant Peter Bercut by the defendants Maffei and Arnold, is substantially as follows:

The books and operations of Merchants Ice for the years 1936, 1937 and 1938 were audited by Haskins & Sells, C. P. A. Witness A. W. Haynes, a partner of the firm, testified from his working papers that as of December 31, 1938, the net worth of Merchants Ice was \$1,270,914.70 (R. 405) or \$18.17 per preferred share outstanding and \$4.80 per share of common outstanding (R. 407) after giving effect to all liabilities, obligations and other deductions including an aggregate reserve for depreciation of \$1,185,957.71. (R. 408.)

On cross-examination, defendant Arnold testified that a fair value for the preferred shares of Merchants Ice, in 1938, was \$10 a share. (R. 879.)

The books and operations of Merchants Ice, for the year ending December 31, 1939, were audited by John F. Forbes & Co. C. P. A. Said audit is Plaintiff's Exhibit 38 set forth at pages 521-570 of the record. The balance sheet is to be found at pages 540-543 of the record. The total assets are there reported to be \$2,112,978.50 and total secured and unsecured liabilities at \$859,827.06, leaving a net worth of \$1,253,151.44.

The balance sheet of the Holding Company for the year ending December 31, 1939, accompanying the letter mailed to its stockholders on June 30, 1940

(See Part II of the Appendix hereof) shows total assets of a book value of \$898,622.05, of which \$123,456.66 represented the carry value of 12,495 shares of preferred, and \$545,906.81 the carry value of 65,863 shares of common of Merchants Ice and Cold Storage Company. *The valuation placed on these shares was based upon the value stated by the audited balance sheet of Merchants Ice and Cold Storage Company as of December 31, 1939, as prepared and certified to by Messrs. John F. Forbes and Company, C. P. A., excepting 13,000 shares of stock which were carried at \$2.50 a share. (See note B to balance sheet of the Holding Company (R. 212.) Also testimony of Arnold (R. 717); testimony of Maffei (R. 202); and testimony of W. W. Haynes. (R. 405, 406).)*

Defendant Maffei, on direct examination was asked whether in his opinion these values represented a fair and reasonable value of the shares of Merchants Ice then owned by the Holding Company and he replied they were. (R. 202.) Defendant Arnold, on direct examination, testified he believed the reasonable value of this block of shares on January 8, 1941 "free from pressure", to be the value at which they were carried on the books of the Holding Company. (R. 882.)

Defendant Arnold (president of Merchants Ice and Cold Storage Company) testified that "1939 was the best year Merchants Ice had enjoyed and that 1940 wasn't quite as high, but it was good", and in 1941 "the general condition (of Merchants Ice) was better". (R. 881.)

Defendant Maffei was asked, on direct examination, why he continued to add to the portfolio of the Holding Company stock of Merchants Ice when it already owned approximately 60% of the outstanding common and $33\frac{1}{3}\%$ of the outstanding preferred, and he replied, "Because I thought it was worth it." (R. 204.)

Witness, Will F. Morrish, president of Bank of America from 1931 to 1934, formerly president of First National Bank of Berkeley, and at the time president of American Toll Bridge Company, was chairman of the board of directors of Merchants Ice from 1938 to about February 15, 1941. He was appointed to that office by Crocker First National Bank of San Francisco, trustee under the bond indenture, for the purpose of protecting the rights of the bondholders of Merchants Ice. (R. 452.) He was a wholly disinterested witness. He owned no stock in any of the companies involved. During his term of office he observed and watched closely the activities and progress of Merchants Ice. He kept a running record of its activities. (R. 453.) He testified that during the period he was on the board the condition of the company showed steady improvement. (R. 457.) In 1940 he was asked by defendant Arnold to make a loan of \$3000 to the Holding Company, which he did, secured by 1500 shares of common of Merchants Ice. (R. 458.) In answer to a question he stated he considered the collateral to be ample security for the loan. (R. 458.)

At pages 458-461 of the Record he gave the following testimony, bearing on the value, as of January 8,

1941, of the shares owned by the Holding Company in Merchants Ice, viz.:

Q. Will you please state, Mr. Morrish, from the records that you have kept in your own handwriting, as I have observed, and from the financial reports of the company which you have examined, and from your own knowledge of the condition of this company what in your opinion was the reasonable, fair net worth of this company at the end of the year 1940, after making full allowance for all of its obligations and liabilities?

A. Well, I would have to refer to some figures that I have here.

Q. Will you please state to what you are referring?

A. As I stated, I have kept a running account of the comparison of the assets and liabilities of the company, and figured that the company in 1940 was making progress and that we were just on the verge of going into a period of very good times when it was sold. The figures that I have got down here were what I called distress figures, and figures that I believe the company could have liquidated for.

Q. By the company you mean the Merchants Ice & Cold Storage Company.

A. The Merchants Ice & Cold Storage Company, yes. The assets as I wrote them down were \$1,576,000.

Q. At what time?

A. I reduced the land values down to \$700,000 as compared with the book value of \$865,000. I am just giving the regular figures, not the odd figures. The buildings I reduced from \$1,003,000

down to \$750,000, and the real estate—there was a small item of other real estate that I put in at \$20,000. The cash, of course, was the accounts receivable, the same, because they had already set up a reserve for loss, and the bottles that they had for sale, which were later sold at \$7,500, giving me a total of \$1,576,000. That is a reduction in the assets as shown by the books of over \$400,000—between \$400,000 and \$450,000.

Now, on the liabilities side, I figured the bonds had to be paid in full at \$659,500. There was an indebtedness to Pacific Empire of \$9,500, which I included, and mortgage on other real estate of \$12,000; notes payable \$3,200; accounts payable \$160,000, and a reserve for contingencies, \$15,000, or a total of \$859,000. Now, that left a net value or a knockdown value, as I expressed it, of \$716,000. I considered the preferred stock was probably worth its book value.

Q. That is \$10 a share?

A. \$10 a share.

Q. Par value, you mean by saying 'book value'?

A. The par value, not the book value. That left in the neighborhood of \$300,000 value for the common stock.

Q. How many shares of common stock were there outstanding?

A. 65,000 odd shares.

Q. How many shares of Merchants Ice & Cold Storage were outstanding?

A. 107,000.

Q. 107,000?

A. Yes.

Q. How much per share of common stock would you say there was reasonably behind the outstanding common as of December 31, 1940, upon the basis of your analysis?

A. Well, basing the preferred at book, it left around \$2.80 a share value for the common.

Q. For the common?

A. Yes.

Q. Now, Mr. Morrish, from your own knowledge of the condition and history of this company and the nature of its property and its maintenance of property and its business problems, would you say or have you formed any opinion with respect to whether or not the sale by Pacific Empire Holdings to Mr. Peter Bercut on or about January 8, 1941, of a block of stock in this company—Merchants Ice & Cold Storage Company, consisting of a little over 65,000 shares of common out of 107,000 and a little over 12,000 shares of preferred out of approximately 41,000 shares outstanding for the sum of \$35,000 was a fair sale?

A. No, I think not.

Q. Have you formed any opinion as to what in your opinion was the reasonable value of that block of stock of 65,000 shares of common and 12,000 shares of preferred owned by Pacific Empire Holdings on or about January 8, 1941?

A. Well, I certainly think they should have been worth about \$200,000 to \$250,000, somewhere around there.

Q. At that time?

A. Yes."

The method followed by witness Morrish in arriving at his valuation is found in Defendant's Exhibits "E" (R. 471) and "F" (R. 474.)

On February 15, 1941 Peter Bercut became president of Merchants Ice and on February 19, 1942 he caused to be mailed to the stockholders of Merchants Ice a letter (Pl. Ex. 19, R. 574) in which he tells them *all about himself and his brother and describes how prominent in business they are and concludes with the statement:*

"With the cooperation of your board of directors, the personnel of your organization, your preferred creditors the bondholders and the good will of your many valued customers, he expressed profound confidence and utmost faith that the financial statements of your company will show a marked improvement in a comparatively short period of time."

Accompanying said letter was the balance sheet of the company as of December 31, 1940 (found at pages 368 to 370 of Record). The net worth of the company as of December 31, 1940, after giving effect to an aggregate depreciation of \$1,336,625.18 on its plant and equipment, is there reported to be \$1,199,136.50, allocable to 41,615 shares of preferred (\$10 par) and 107,188 shares of common (\$10 par) outstanding.

So correct was the defendant Peter Bercut in his prophecy to the stockholders of Merchants Ice that immediately after he became president of Merchants

Q. How much per share of common stock would you say there was reasonably behind the outstanding common as of December 31, 1940, upon the basis of your analysis?

A. Well, basing the preferred at book, it left around \$2.80 a share value for the common.

Q. For the common?

A. Yes.

Q. Now, Mr. Morrish, from your own knowledge of the condition and history of this company and the nature of its property and its maintenance of property and its business problems, would you say or have you formed any opinion with respect to whether or not the sale by Pacific Empire Holdings to Mr. Peter Bercut on or about January 8, 1941, of a block of stock in this company—Merchants Ice & Cold Storage Company, consisting of a little over 65,000 shares of common out of 107,000 and a little over 12,000 shares of preferred out of approximately 41,000 shares outstanding for the sum of \$35,000 was a fair sale?

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So correct was the defendant Peter Bercut in his prophecy to the stockholders of Merchants Ice that immediately after he became president of Merchants

Ice (February 15, 1941) the company began to show great improvement, as Peter Bercut "expected it would". (R. 345.) The company's condition in fact improved so much and so fast that during the (direct examination of Peter Bercut (barely two years after his acquisition of the said shares) he was asked whether he would take a "*million dollars* for the same block of shares" and he replied, "No, I am not selling it today". (R. 344.)

(h) Stealth and secrecy of transaction; lack of corporate action.

The defendants Arnold and Maffei readily admit, and the corporate records in evidence conclusively show, that at no time, either before or after the transaction, were there ever held any meeting of either the board of directors or executive committee of the Holding Company or of Pacific Empire Corporation for the purpose of passing upon or authorizing or ratifying the "sale" made by the defendant Maffei and Arnold, purporting to act as president and secretary, respectively, of the Holding Company, to the defendant Peter Bercut. (See testimony of Arnold, R. 727 and 761; testimony of Maffei, R. 226.) None of the other directors of said corporations were ever consulted. (Testimony of Maffei, R. 227.) The said transaction was kept secret from the stockholders of both corporations. (Testimony of Arnold, R. 727-728; testimony of Maffei, R. 226.) Director Webb Richards, a witness called by the defendants, testified, at page 638 of the record, that the first time he knew

the true details of the transaction was not until on or about August 20, 1942, at which time Mr. Scampini disclosed to him the true facts.

The creditors of the Holding Company, who made inquiries concerning the deal, were *falsely* informed of the nature of the deal by the defendants Arnold and Maffei. (See testimony of George Q. Chase, R. 246.) Defendant Arnold admits having falsified the true nature of the "deal" to some of the directors and to Mr. Scampini, one of the creditors, who made inquiries (see R. 891-892), and witness Will F. Morrish, on direct examination, testified that "on or about February 15, 1941 (just before the annual meeting of the stockholders of Merchants Ice) defendant Arnold told him that he was going to sell one-half of the shares of Merchants Ice owned by the Holding Company to Peter Bercut for \$45,000" and thereupon witness Morrish told Arnold that "*it was a steal at that price*". (R. 463.)

No efforts were made by the defendants Maffei (R. 231), Arnold or Peter Bercut to obtain a better price for the block of shares "sold" to Peter Bercut although defendants Arnold and Maffei admit that they had often been told by George Q. Chase, A. J. Scampini and Joseph I. McInerney, all of them large creditors of the Holding Company, that they would be interested in buying said block of shares or portions of them should it ever become necessary for the Holding Company to dispose of them. (See

testimony of Arnold, R. 876, 888 to 891; testimony of Maffei, R. 228; and testimony of George Q. Chase, R. 240-241.) Defendant Peter Bercut admits having negotiated for the acquisition of said shares at the cheapest possible price to himself (R. 341) and defendant Arnold admits that he was "in a hurry to close the deal" and that Peter Bercut knew he was in "a hurry". (R. 875.) In fact, witness Chase, at page 246 of the Record, testified that Arnold told him the reason he made the deal with Peter Bercut was because "they were in a jam, and on the spot, and they had to do something quickly".

Defendant Arnold excuses the transaction on the ground that the financial condition of the Holding Company and of Merchants Ice required that it be done hastily and secretly because of what he termed "pressure from all sources". (R. 753.) Upon inquiry he stated that the pressure was coming from the Pacific National Bank of San Francisco, to which bank the Holding Company, Pacific Empire Corporation, and Merchants Ice owed considerable sums of money, and which loans, Arnold states (R. 733) were being criticized by the bank examiners. But H. R. Gaither, president of the bank, upon direct examination, testified that the loans of these companies were in good standing and that no pressure was exerted by the bank and that he considered the loans of these companies well secured and good. (R. 504-504.)

It is obvious that the only "pressure" under which defendants Arnold and Maffei were laboring was the

pressure of the judgment obtained by the United States against the Holding Company on November 11, 1940, upon which judgment an execution on the shares of Merchants Ice then owned by the Holding Company was anticipated, thus terminating the control which these parties exercised and had over the entire picture and exposing them to just punishment for their mismanagement.

(i) The resignation of defendant Peter Bercut as vice president and director of the Holding Company.

The trial Court in its finding III (R. 943) found that the defendant Peter Bercut became a director of the Holding Company on February 15, 1933, a member of its executive committee on February 19, 1935, and a vice-president on March 28, 1933, and continued as such until "his resignation as such director, officer and member on or about the first day of May, 1940". In finding V the trial Court (R. 946) found that on said day the by-laws provided for seven directors, but that only *six* were serving, to-wit: Maffei, Heer, Arnold, Giacchino, Richards and Ryerson. It also found that said by-laws provided for an executive committee of three directors, but that only two were serving as such, to-wit: Maffei and Arnold.

The evidence in the record with respect to these facts is as follows:

Defendant Peter Bercut, at pages 320-321 of the record, testified that around April of 1940, he *verbally*

told defendant Arnold that "I did not care to take any more interest in the company" and that he meant both the Holding Company and Empire Corp., because, he says: "I never knew the difference between the two corporations, because they were so mixed. I meant both".

At pages 321-322 of the record defendant Peter Bercut gave the following testimony:

"Q. I asked you to whom else besides Mr. Arnold in these companies, that is, the Pacific Empire Holdings and the Pacific Empire Corporation, you made known your intention not to continue as an officer or director.

A. I told Arnold.

Q. You just told Arnold and nobody else?

A. That is all.

Q. You did not tell anybody else, did you?

A. No.

Q. You never sent in a resignation to either one of the companies later on, did you?

A. Later on I asked for my resignation in writing.

Q. You asked for your resignation first?

A. Yes, and I asked later to give it to me in writing.

A. Let us get to the bottom of this thing. Did you ever file a written resignation as an officer or director of the Pacific Corporation?

A. Yes.

Q. When did you?

A. When we started to deal on this, I told Mr. Arnold that I would like to have my resignation in writing.

Q. You mean that you told Mr. Arnold you would like to submit your resignation in writing?

A. No; I wanted to resign, but I wanted everything in writing.

Q. You wanted to file it in writing?

A. I wanted to go on record.

Q. When did you tell that to Mr. Arnold?

A. Just when we were dealing for the purchase of the Merchants Ice & Cold Storage Company."

At pages 330 and 331 of the record he admits he never told defendant Maffei (who was the president of both companies) or any other director of either company that he had "orally" resigned.

He admits, however, that he continued thereafter as a director of Merchants Ice and Pacific National Bank of San Francisco.

At page 324 of the record defendant Peter Bercut testified that *after the commencement of the negotiations with Arnold, but before their completion*, and "when I saw there was a possibility of making the deal I wanted to make sure I was not a director, because I had resigned orally, and I wanted to be sure it was in writing". So he says he *signed one letter of resignation*, which is Plaintiff's Exhibit 26 (R. 400), addressed to Pacific Empire Holdings, Inc., and antedated to March 31, 1940.

At page 322 of the record he testified that the signature appearing at the bottom of the letter was

his—but that defendant Arnold dictated the letter to his stenographer. He then says “I never dictated anything to any of Arnold’s stenographers”.

It should be observed here that at the bottom of the letter of resignation appears the initials PB/LK—which—as hereinafter discussed, obviously meant “Peter Bercut to Leona Keener”.

Turning to the testimony of Leona Keener (R. 675-681) we find that she, a stenographer-secretary in the office of the Holding Company during January, 1941, on direct examination testified as follows (R. 678-681):

“Q. Were you acting as such stenographer-secretary on or about January 8, 1941?

A. Yes.

Q. And as such do you recall anything unusual happening, or any dictation which took place at or about that time, or immediately prior or immediately thereafter, concerning the resignation of Mr. Peter Bercut?

A. Yes.

Q. And do you recall that incident?

A. I do recall it.

Q. Approximately when did it take place?

A. It was approximately in January—the latter part of January.

Q. Of what year?

A. Of 1941.

Q. And what did take place? Tell us to the best of your recollection exactly what happened.

A. Mr. Bercut was in the office and asked me to dictate—or to dictate to me a resignation to the

holding company as officer and director of that company.

Q. And did you take it in your notebook then at that time?

A. Yes.

Q. And have you got that notebook with you?

A. Yes, I have. (Producing notebook.)

Q. Will you please find it—look at your notebook and see if you have any record of the dictations of Mr. Peter Bercut?

A. I have it.

Q. And what is that notebook which you have in your hand now?

A. This is the notebook that I used for the holding company. This is from the year '41 I'm looking at right now.

Q. And what page are you looking at?

A. I don't quite understand you.

Q. I say what page of the notebook? Have you got the pages numbered?

A. No, I haven't.

Q. Well, do you find any record in that notebook which you have of the dictation of Mr. Peter Bercut to you concerning his resignation?

A. Yes.

Q. And is it written in shorthand?

A. Yes, it is.

Q. And will you read it into the record, please?

A. Yes. (Reading from notebook.) By Peter Bercut to Pacific Empire Holdings. 'Because of the pressure of this business I will be unable to devote sufficient time to the company to be of real value. Consequently please consider this

letter as my resignation as an officer and director of Pacific Empire Holdings, Incorporated.'

Q. Have you got any notation on that page of the date on which the dictation was given to you?

A. The date was January 29th, '41.

Q. And who were present, so far as you recall, at the time the dictation took place?

A. Mr. Bercut and Mr. Arnold and myself.

Q. Was there any discussion between these parties in your presence, that you recollect?

A. Yes, there was. The resignation was dated back to, as my records show, March 3rd, 1940.

Q. And was anything said concerning that phase of the transaction or dictation, by any of the persons present?

A. Nothing, except to date it back.

Q. And who said to date it back, if you recall.

A. I couldn't say who said it.

Q. Did you date it back pursuant to instructions?

A. Yes, I did.

Q. And you afterwards transcribed the notes which you have just read into letter form, did you?

A. Yes.

Q. And what did you do with that letter?

A. Mr. Bercut signed it. I gave it to Mr. Bercut, and he signed it.

Q. And then what happened to the letter?

A. And then, as I recall, he turned it over to Mr. Arnold. I couldn't be definite on that.

Q. I see. Was any dictation given to you by Mr. Peter Bercut at that time or at any other time to your knowledge concerning resignation in the Pacific Empire Corporation?

A. Nothing at all; that is the only one I have."

On cross-examination Miss Keener produced the shorthand notebook wherein she took down in shorthand the dictated letter of resignation—and a photographic copy of the page upon which said letter appears is to be found at page 690 of the record.

The defendant Arnold testified flatly that on January 8, 1941, the defendant Peter Bercut was vice-president, a director and member of the executive committee of the Holding Company, and a director and vice-president of Empire Corporation, a director of Merchants Ice and Cold Storage Company and of Pacific National Bank of San Francisco. (R. 719-721, 724, 732-767.)

At page 745 of the record defendant Arnold testified that he received the letter of resignation of Peter Bercut (P. Ex. 26) "on or about the time of the conclusion of the negotiations having to do with the sale". At page 746 he testified that the question of whether Peter Bercut should resign as a director (in view of the deal) was brought up for discussion by defendant Peter Bercut—and *that the letter of resignation was dictated by Peter Bercut in the offices of the Holding Company* "on or about the time when we were concluding the negotiations, yes".

Defendant Maffei flatly testified that Peter Bercut was a director, vice-president and member of the executive committee and director and vice-president of Empire Corporation on January 8, 1941, and a director of Merchants Ice and Pacific National Bank of San Francisco. (R. 224-225.) At page 262 of the record, Maffei testified that about a week or two after the "deal was made" Mr. Arnold advised him that Peter Bercut had resigned from the corporation "and that he had the girl in the office date back the resignation two or three weeks". (R. 263.)

It should here be again observed that as shown by the minute books of the Holding Company (Vol. 5, pages 100-101) a special meeting of the executive committee of the Holding Company was held on October 17, 1940. On the same day a special directors meeting of Empire Corporation was held. At both meetings Peter Bercut is declared in the minutes to have attended (R. 192-193), and defendant Maffei testified the minutes were correct (R. 194), although defendant Bercut denies having attended either meeting and the minutes were not signed by him.

It is evident that the only particle of evidence in the record sustaining the finding of the trial Court to the effect that Peter Bercut had resigned as an officer and director of the Holding Company and Empire Corporation is the declaration by Peter Bercut to the effect that on or about May 1, 1940, he "verbally" told defendant Arnold, who, like Bercut,

was a mere vice-president and director, and *no one else* that he, Bercut, did not want to have anything more to do with the companies.

Without considering here the legal insignificance of such a statement made by one director of a company to another director, insofar as it bears on the question of whether one is or is not a director of a corporation, we should point out to the Court that defendant Peter Bercut did not hesitate, *on two occasions to testify falsely on the stand.*

First, he testified that he never dictated the said letter of resignation dated March 31, 1940, whereas, a wholly disinterested witness, Leona Keener, a mere stenographer, proved conclusively by her notebook that Bercut did dictate said letter to her on January 29, 1941, *and did date it back to March 31, 1940.*

Secondly, the defendant Peter Bercut was also asked (R. 359) whether he then owned 500 shares of Frostcraft Corporation. He there testified that he did not—and that he did not “remember” whether Merchants Ice owned the 500 shares when he was president. Witness C. J. Collins, president of Frostcraft was called as a witness on behalf of plaintiff and at page 441 of the record testified that Mr. Plagemann (secretary of Merchants Ice) caused to be transferred 500 shares of Frostcraft (certificate in name of A. N. C. Produce Co.) to Peter Bercut and Henri Bercut, each receiving 250 shares.

The weakness of defendant Peter Bercut's assertion that he verbally resigned in May of 1940 is best emphasized by his failure to also resign from Merchants Ice which, throughout the intervening months to January 8, 1941, continued to be controlled by the Holding Company and looted by Maffei and Arnold, and the same motives which prompted his alleged oral resignation from the Holding Company should have prompted him likewise to resign from Merchants Ice.

(j) The insolvency of the Holding Company. Appointment of receiver and repudiation of transaction.

As the result of the said transaction the Holding Company found itself without assets. It had previously pledged to Kohler & Chase all of its shares in Pacific Empire Corporation as security for the payment of about \$13,000 due to Kohler & Chase for unpaid rent. Not being able to pay said rent, after the sale of Merchants Ice stock, Kohler & Chase foreclosed on the pledge and acquired ownership of all of the stock of Pacific Empire Corporation owned by the Holding Company. (See testimony of George Q. Chase, R. 237.)

Prior to the transaction with Peter Bercut, the Holding Company had already sold 47½% interest in California Pacific Service, Inc. to Joseph I. McInerney for \$15,000. (R. 188.) The 47½% remaining in the Holding Company had been pledged by the Holding Company to Messrs. Ellis & Steindorf, and

Conrad T. Hubner, as security for the payment of several thousand dollars owed to these attorneys for legal services performed by them. (See testimony of Arnold, R. 884.)

The stock of Pacific National Bank of San Francisco owned by Pacific Empire Corporation had been sold to Mr. Gaither and the proceeds applied on account of the loans of the Holding Company to Pacific National Bank of San Francisco. (See testimony of Maffei, R. 190, and testimony of Gaither, R. 504.) The remaining assets of the Holding Company were of no value. (See testimony of Arnold, R. 884.)

The aggregate liabilities of the Holding Company exceeded \$300,000, of which over \$150,000 was owing to Pacific Empire Corporation; over \$30,000 to California Pacific Service, Inc., approximately \$12,000 to the United States on said judgment; \$13,000 to Kohler & Chase for unpaid rent; the franchise taxes remained unpaid; Corporation Trust Company remained unpaid, and in addition there were other creditors. (See testimony of Arnold, R. 842, for a list of creditors.

On or about July 20, 1942, the Holding Company received a letter from Thos. H. Wingate, an attorney in Wilmington, Delaware, (claiming to represent certain stockholders) demanding information concerning the affairs of the company and threatening suit to appoint a receiver. (Defendants' Exhibit D, R. 424.) Thereupon defendants Arnold and Maffei con-

sulted with A. J. Scampini, Esq., who, up to 1936, when he resigned (R. 153), had been the attorney for the Holding Company and Pacific Empire Company, as well as an officer and a director of Pacific Empire Corporation and of Merchants Ice & Cold Storage Company.

Defendants M. Maffei and L. R. Arnold, at said conference with A. J. Scampini, divulged the true situation of the Holding Company and of Pacific Empire Corporation, and all of the facts and circumstances surrounding the transaction of January 8, 1941, with Peter Bercut. (R. 821.) Mr. Scampini thereupon advised said parties that in his opinion, the Holding Company was insolvent; that the said transaction was illegal and that they should consent to the appointment of a receiver for the purpose of prosecuting an action on behalf of the Holding Company, its creditors and stockholders, looking towards recovering the shares of Merchants Ice which had been illegally delivered to Peter Bercut on January 8, 1941. (See testimony of Arnold, R. 820; testimony of Richards, R. 642.)

Thereupon, a special meeting of the Board of Directors of Pacific Empire Holdings, Inc. was held on August 20, 1942, by written consent. At said meeting, *which was the first meeting held since prior to October 27, 1940, the written resignation of Peter Bercut, dated March 31, 1940, (but signed and delivered by him on or about January 29, 1941) was submitted to*

the board and accepted. At said meeting the whole transaction of January 8, 1941, with Peter Bercut, was for the first time divulged to the directors and said directors thereupon passed a resolution consenting to the appointment of a receiver in equity for the company so that said receiver might prosecute proper action against Peter Bercut and all other persons involved (including defendants M. Maffei and L. R. Arnold), looking toward the recovery of the shares of Merchants Ice delivered to Peter Bercut. (See testimony of director Webb Richards, R. 642.)

On August 31, 1942, in a proceeding for that purpose, Thos. H. Wingate, plaintiff herein, was appointed receiver in equity of Pacific Empire Holdings, Inc. On September 9, 1942, said receiver, acting through his attorney, formally repudiated and rescinded the said transaction of January 8, 1941. (Pl. Ex. 34, R. 393.) Thereupon the complaint in this cause was filed.

Part IV.

PROCEEDINGS BEFORE THE DISTRICT COURT.

(a) Complaint.

The complaint filed by plaintiff in this cause consists of three counts.

The first count seeks a declaration by the Court to the effect that: (a) a purported letter agreement between Pacific Empire Holdings, Inc. and Peter Ber-

cut, dated January 8, 1941 (Plaintiff's Exhibit 22), was and is not a corporate act valid and binding upon Pacific Empire Holdings, Inc. or plaintiff, as its receiver; (b) that title to the 78,365 shares of Merchants Ice and Cold Storage Company stock delivered to the defendant Peter Bercut pursuant to said letter agreement is still vested in plaintiff; (c) that the defendants Peter Bercut and Henri Bercut are holding said shares as trustees for plaintiff; (d) that the defendants Peter Bercut, Henri Bercut, M. Maffei and L. R. Arnold account to plaintiff for their conduct as such trustees and pay over to plaintiff any profits secured or obtained by any of them as the proximate result of said transaction.

The second count is predicated on the proposition that plaintiff, as receiver, vested with title to all of the assets of Pacific Empire Holdings, Inc. is the lawful owner of said 78,365 shares of Merchants Ice and Cold Storage Company now in the possession of Peter Bercut and Henri Bercut; that demand for their return having been made and refused, plaintiff is entitled to bring an action for claim and delivery for said shares and for all damages suffered as the result of the failure of the defendants to deliver them to plaintiff.

The third count is predicated on the proposition that the defendants Peter Bercut, Henri Bercut, M. Maffei and L. R. Arnold converted to their own use and benefit the said 78,365 shares of Merchants Ice

and Cold Storage Company to the damage of Pacific Empire Holdings, Inc. in the sum of one million dollars.

(b) Answer of defendants Peter & Henri Bercut.

The answer of the defendants Peter Bercut and Henri Bercut, substantially alleges that Peter Bercut was not an officer or director of Pacific Empire Holdings, Inc. at the time of the transaction, and that said transaction was in every respect valid and fair and legally binding upon Pacific Empire Holdings, Inc. and its receiver. They deny that they have converted said shares and allege that they are the lawful owners of them.

In addition, said defendants have pleaded as and by way of a second, special defense the lack of capacity on the part of plaintiff to prosecute this action. Said defendants have also sought to plead, by way of a third, special defense, a failure on the part of plaintiff to properly rescind said contract; and by way of a fourth and fifth special defense they have sought to plead an estoppel against plaintiff arising out of a general claim of informal ratification by the directors and stockholders of Pacific Empire Holdings, Inc. resulting from their non-action or non-protest as well as their alleged laches.

Said defendants subsequently filed an amended answer and cross-complaint against plaintiff claiming that they have not received all of the shares agreed to

be delivered to them and they now seek a judgment of this Court for the alleged undelivered portion of the shares. They further seek a judgment against plaintiff for \$3850 alleged to have been advanced by them to Pacific Empire Holdings, Inc.

(c) Answer of defendants M. Maffei and L. R. Arnold.

The answer of the defendants M. Maffei and L. R. Arnold, substantially, deny that they have any of the said shares or that they have converted any of them to their own use or that they have in any way personally profited as the result of the transaction dated January 8, 1941, with Peter Bercut.

(d) Proceedings.

The cause was tried in the District Court, before the Honorable Michael J. Roche, judge, sitting without a jury.

On July 6, 1943, the Court entered a minute order awarding judgment to the defendants and against plaintiff, each side to bear its own costs. (R. 939.)

Counsel for the defendants Peter Bercut and Henri Bercut thereupon filed their proposed findings of fact and conclusions of law, and plaintiff filed with the Court his exceptions to said proposed findings and conclusions. (R. 930-938.) Plaintiff accompanied said exceptions with his proposed findings and conclusions, and also moved the Court for a rehearing and new trial, and a motion for judgment in favor of plaintiff, specifying therein his grounds. (R. 958.)

On August 9, 1943, the Honorable Michael J. Roche, judge, denied plaintiff's motion for judgment and for a rehearing and new trial (R. 959), and signed the findings and conclusions proposed by the said defendants with one change in finding XI, wherein the trial Court struck out a finding which originally read to the effect that plaintiff had failed to tender to the defendants Peter and Henri Bercut the sum of \$35,000 or any sum. As the findings now stand, the trial Court failed to find with respect to this point. (R. 953.)

Judgment was thereupon entered in favor of defendants upon said findings. (R. 956.)

On August 13, 1943, plaintiff filed his notice of appeal to this honorable Court and designated for inclusion in the record on appeal the complete record and all the proceedings and evidence in the action, including all exhibits, which by stipulation and order of Court have been sent up in their original form.

Part V.

QUESTIONS INVOLVED—HOW RAISED?

1. Are the findings of fact of the trial Court numbered III, IV, V, VII, VIII, IX, X, XII and XIII, or any of them, supported by any substantial evidence in the record?

2. Are the conclusions of law made in this cause by the trial Court supported and warranted by any proper finding of fact?

3. Was the judgment entered in the cause by the trial Court in favor of the defendants and against plaintiff consistent with the law of the case, just, and proper?

4. Should not the trial Court, on the facts and the evidence disclosed by the record, have entered judgment in favor of plaintiff and against the defendants as prayed for in plaintiff's complaint?

We submit and contend that questions 1, 2 and 3 above should be answered in the negative, and with respect to question No. 4, the trial Court should have entered judgment in favor of plaintiff as prayed for in plaintiff's complaint.

The following matters of record are relied upon by plaintiff to frame said issues:

(a) The pleadings.

(b) The evidence of the case adduced during the trial as disclosed by the record together with the exhibits.

(c) The minute entry made by the Court, rendering judgment in the cause in favor of defendants. (R. 939.)

(d) The exceptions filed by the plaintiff to the findings of fact and conclusions of law proposed in the cause by the defendants Peter Bercut and Henri Bercut. (R. 930.)

(e) The findings of fact and conclusions of law proposed by the plaintiff to the Court. (R. 904.)

(f) The findings of fact and conclusions of law made by the Court. (R. 940.)

(g) The judgment entered in the cause by the trial Court. (R. 956.)

(h) The motion made by plaintiff to the trial Court for a rehearing, new trial and for judgment in favor of plaintiff. (R. 957.)

(i) The denial of said motion by the trial Court. (R. 959.)

Part VI.

SPECIFICATIONS OF ERROR.

Point No. 1—Finding III of the trial Court is contrary to the evidence, and erroneous insofar as it purports to find that defendant Peter Bercut resigned as an officer, director and member of the executive committee of the Holding Company on or about the first day of May, 1940.

Point No. 2—Finding IV of the trial Court is materially contrary to the evidence and erroneous insofar as it purports to find that the reasonable value, on January 8, 1941, of the 12,493 shares of preferred and 65,863 shares of common of Merchants Ice "sold" to Peter Bercut was not in excess of the sum of \$35,000.

Point No. 3—Finding V of the trial Court is materially contrary to the evidence and erroneous insofar

as it purports to find that on January 8, 1941, the defendant Peter Bercut was not a director and member of the Executive Committee of the Holding Company.

Point No. 4—Finding VII of the trial Court is wholly contrary to the evidence, and erroneous in fact, conclusion and law.

Point No. 5—Finding IX of the trial Court is wholly contrary to the evidence and erroneous.

Point No. 6—Finding X of the trial Court is wholly contrary to the evidence and erroneous.

Point No. 7—Findings XII and XIII of the trial Court are wholly contrary to the evidence, and erroneous in fact, conclusion and contrary to the law of the case.

Point No. 8—The conclusions of law and judgment of the trial Court are erroneous, not based upon any proper findings and contrary to the law and equity of the case on the following legal and equitable grounds:

(a) The transaction of January 8, 1941, purported to have been entered into between the Holding Company and defendant Peter Bercut was not a valid corporate act binding upon the corporation, its creditors, stockholders or receiver;

(b) The said transaction was legally void because it constituted a flagrant breach of trust on the part of fiduciaries;

(c) The said transaction was legally void because it constituted a flagrant fraud on creditors and was intended to and did succeed in hindering, delaying and defrauding the creditors of the Holding Company.

Point No. 9—Judgment in this cause should be rendered in favor of plaintiff as prayed for in plaintiff's complaint.

Part VII.

THE ARGUMENT.

POINT No. 1.

In its finding III, the trial Court found that defendant Peter Bercut resigned on or about May 1, 1940, as a director, vice president and member of the executive committee of the Holding Company.

Finding III of the trial Court is contrary to the evidence and erroneous in that the record conclusively shows the defendant Peter Bercut *did not* resign as an officer and director of the Holding Company until on or about January 29, 1941, and his resignation was never accepted until October 20, 1942.

Here, we respectfully refer the Court to Part III (i) of this brief wherein we have set forth the facts and the evidence disclosed by the record with respect to the resignation of Peter Bercut as an officer and director of the Holding Company,

and, by reference, we here incorporate the record pages and excerpts of testimony there quoted.

The claim of Peter Bercut that he "verbally" resigned on or about May 1, 1940, by so stating to the defendant Arnold, is denied by the defendants Maffei and Arnold, and by the subsequent conduct of defendant Peter Bercut.

Why should Peter Bercut tell Arnold—a mere vice president like Bercut, that he, Bercut, was resigning? Why did not Bercut tell Maffei, who was the president? Why did not defendant Bercut send in a written resignation after he told Arnold that he wanted to resign? Why did he keep his alleged "verbal" resignation a secret from every other director?

Why do the minutes of the executive committee meeting of the Holding Company, held October 27, 1940 (R. 192), and the special directors meeting of Empire Corporation, held the same day (R. 193), state that defendant Peter Bercut was present—if in fact he had already resigned?

Why did Peter Bercut dictate the letter of resignation after the consummation of the deal—and ante date it to March 31, 1940? Why did he not resign at the same time from Empire Corporation, and why did he continue to act as a director of Merchants Ice and Pacific National Bank, if in fact, as he states, he wanted to sever his relations with these concerns?

The only reasonable answer to these questions is that defendant Peter Bercut did not "verbally" resign on or about May 1, 1940. He only resigned from the Holding Company management after the consummation of the deal (as stated by defendant Maffei (R. 267) and defendant Arnold (R. 745), and ante dated his resignation back almost a year—because he suddenly realized the legal infirmity of the deal he had made and he tried, as best he could, to remedy the weakness of the transaction.

The finding of the trial Court on this point is further erroneous because, assuming, *arguendo*, that Peter Bercut verbally told Arnold, on or about May 1, 1940, that he was terminating his relations with the company, such a statement has no legal significance or effect. The by-laws, admitted in evidence, state that a resignation of a director must be first "duly accepted" by the board before there is a vacancy. (See Part I of Appendix hereto.)

In *Bowen v. Imperial Theatres Inc.*, 13 Del. Ch. 120, 115 Atl. 918, it was held that:

"Where the minutes failed to recite that a person had been elected director but did record that he was a member of the Executive Committee (Sec. 9 of the Delaware Corporation Laws requiring members of committees to be directors) such record is evidence that the person has acted as a director."

In *Lippman v. Kehoe Stenograph Co.*, 11 Del. Ch. 190, 98 Atl. 943, it was held that when a director sends in his resignation and it is not acted upon he still continues as a director.

Also, in *Chelsea Exchange Corp.*, 18 Del. Ch. 287, 159 Atl. 432, it was held that a director's resignation must be accepted before it is effective.

To the same effect are:

Sec. 591 of 6a *Cal. Juris on Corporations*;
Boston Tunnel Company v. McKenzie, 67 Cal. 485;

Reed & Co. v. Harshall, 12 Cal. App. 697.

We respectfully submit that the record conclusively shows the defendants M. Maffei, L. R. Arnold and Peter Bercut to have been the "managing directors" of the Holding Company and all of its subsidiaries at all times until on or about January 29, 1941, and their control over the management of these concerns was assured by means of the voting trust. (Pl. Ex. 20, R. 216), with respect to the Holding Company, and the proxy (Pl. Ex. 21, R. 218) with respect to Empire Corporation.

In view of these undisputed facts, the defendants Maffei, Arnold and Bercut, on January 8, 1941, were fiduciaries of the Holding Company and its subsidiaries, their creditors and stockholders. (See *Pepper v. Litton*, 308 U. S. 295.) In *Wagner Electric Corporation v. Hydraulic Brake Co., et al.*, 257 N. W. 884 (Mich. 1934), it was held:

“When a holding company controls a corporation, elects its officers and determines its policy, the officers elected by it must act in good faith and for the benefit of the stockholders of the subsidiary corporation.”

POINT No. 2.

In its finding IV the trial Court, among other facts, finds that “on January 8, 1941, the reasonable value of said shares (to-wit: 12,493 shares of preferred and 65,863 shares of common of Merchants Ice) was not in excess of the sum of \$35,000”.

We respectfully submit that in view of the evidence adduced at the trial (which we have summarized, by quoting the record, under Part III (g) of this brief) the finding of the trial Court with respect to the reasonable value of said block of shares of Merchants Ice, is clearly contrary to the evidence, and erroneous. All of the evidence in the record (excepting the irrelevant testimony of Peter Bereut, who admits he tried to buy the block of shares as cheaply as possible) is to the effect that the reasonable value of said block of shares (keeping in mind that it represented more than one-third of the outstanding preferred and more than one-half of the outstanding common of Merchants Ice) was, on January 8, 1941, not less than \$250,000.

The only substantial testimony in the record with regard to the reasonable value of this block of Mer-

chants Ice stock was introduced by plaintiff. The defendants offered no real evidence as to the intrinsic reasonable value of this block of shares. The testimony of defendants' witnesses, Louis T. Samuels (R. 643-663) and F. C. White (R. 580-588) and L. J. Spuller Jr. (R. 589-591) is clearly worthless. But the plaintiff introduced into the record not only the appraisal of the company's properties made by the American Appraisal Company in 1927, supplemented by an engineering report made in 1936, but also audits of the company's operations and balance sheets for the years 1937, 1938 and 1939, prepared by independent certified public accountants. In addition to this evidence we have the irrefutable and uncontradicted testimony of William F. Morrish, not only a most competent and informed witness in that respect, but in addition, a most disinterested witness. To our mind the testimony of William F. Morrish is conclusive with respect to the then true, intrinsic, reasonable value of the block of Merchants Ice stock acquired by Peter Bercut. Morrish testified that, in his opinion, a knock down, very conservative liquidating value for the block on January 8, 1941, was not less than \$250,000 (R. 461), to which should be added an additional value for the fact that it represented the control of a long established going concern. *We respectfully submit that the defendants, whose burden it was to prove that Peter Bercut paid an adequate price for this block of shares, failed completely to rebut the testimony of Mr. Morrish. Furthermore, the testimony*

of Mr. Morrish is amply supported by the appraisals and audits of the company offered and received in evidence.

To hold that the sum of \$35,000 paid for this block of shares by Peter Bercut (out of which sum the Holding Company actually received the net sum of less than \$5000 for the benefit of its general and judgment creditors) represents a "fair consideration" would be a mockery.

POINT No. 3.

Finding V of the trial Court to the effect that on January 8, 1941, the defendant Peter Bercut was not a director and member of the executive committee is clearly erroneous and contrary to the evidence for the reasons discussed herein under Point No. 1.

POINT No. 4.

Finding VII of the trial Court is wholly contrary to the evidence, and erroneous in fact, conclusion and law for the following reasons:

By said Finding VII the trial Court, among other things, found that on January 8, 1941, Pacific Empire Holdings, Inc., by and through its president M. Maffei, and its secretary L. R. Arnold, *acting within the course and scope of their authority for and on behalf*

of said corporation sold to Peter Bercut, for and on behalf of himself and Henri Bercut, 12,495 shares of preferred stock and 65,863 shares of common stock of Merchants Ice & Cold Storage Company for \$35,000.

This finding of fact is erroneous and contrary to the evidence for the reason that the defendants M. Maffei and L. R. Arnold, as president and secretary, respectively, of the Holding Company, had no authority to enter into said transaction for and on behalf of the corporation and did not act within the course and scope of their authority as such officers and the said transaction was not the valid, binding corporate act of the corporation—all of which will be hereinafter further discussed under subdivision (a) of our Point No. 8.

Said Finding VII further finds, among other things, that said agreement of sale was in all respects fair and equitable to Pacific Empire Holdings, Inc. and was entered into in good faith after lengthy negotiations at arms length by and between the said corporation acting through independent and disinterested officers and directors and said Peter Bercut upon a full disclosure of all facts relating thereto at a time when the said defendant Peter Bercut was no longer a director or member of the executive committee of the corporation.

In view of the record and the testimony quoted by us under Part III (d)(e)(f)(g) and (h) of this

brief, it is almost unbelievable to us that the trial Court should have made such a finding.

* The Record conclusively shows that the transaction was "hastily" entered into by the defendants Arnold, who admits that he was in a hurry because "they were on a spot and in a jam" (R. 246); that the negotiations were conducted exclusively between the defendant Arnold and Peter Bercut, while the defendant Maffei, president, was called in to sign the document (R. 224); that it was kept a complete secret from all stockholders, directors, creditors of the company; and that the nature of the transaction was in every case misrepresented to the creditors and directors. Not a single directors' meeting was held, either prior, concurrently or after the transaction; no executive committee meeting was ever held; not a stockholders' meeting was ever called, and none of the other directors, which constituted a majority of the board, were ever consulted about the transaction. (See testimony of Arnold, R. 761; and testimony of Maffei. (R. 225.)

The finding of the trial Court that defendant Peter Bercut was not, at the time, an officer and director of the corporation is a mere repetition of finding III, and the finding to the effect that the price of \$35,000 for the said shares was the fair and reasonable and proper price is again a mere repetition of finding IV.

The finding of the trial Court that said agreement of sale was in all respects fair and equitable to Pacific

Empire Holdings, Inc., to our mind, is a travesty of justice because, as defendants Arnold and Maffei admit (R. 225, 884) the result of the transaction assured the collapse of the Holding Company and the defraudment of its creditors and stockholders and the creditors and stockholders of Empire Corp. as well as the United States Government. How any agreement, whereby an asset, reasonably worth not less than \$250,000 at the time, and carried on the books of the corporation at over \$650,000, and constituting practically 70% of the assets of the Holding Company, which is hastily and secretly transferred over to one of the company's officers and directors for a net sum of \$4000, can be held to be fair and equitable is to us inconceivable. We will return to a further discussion of this phase of the case in our argument under Point No. 8.

POINT No. 5.

In its finding IX the trial Court found that the "sale" of Merchants Ice stock made by the defendants Maffei and Arnold to defendant Peter Bercut on January 8, 1941, did not render Pacific Empire Holdings, Inc. insolvent, or unable to meet its debts, and was not in fraud of its stockholders or creditors.

We respectfully submit that the evidence set forth in the Record and cited by us under Part III (j) of this brief, conclusively shows that on January 8, 1941,

the 12,493 shares of preferred and 65,863 shares of common of Merchants Ice, owned by the Holding Company, represented almost the entire asset position of the Holding Company. (See balance sheet—Pl. Ex. 15, R. 210.) At the time of the “sale” of these shares the aggregate liabilities of the Holding Company, then due and payable, exceeded \$300,000. (Testimony of Arnold, R. 842; testimony of Maffei, R. 183, 225.) Upon the “sale” of said shares for a nominal consideration the Holding Company had substantially “nothing” left with which to pay any of its creditors or with which to satisfy the judgment for \$11,942.80 obtained by the United States on November 20, 1940. (R. 199).

To find that such transaction did not render the Holding Company insolvent and did not constitute a fraud on creditors, it is respectfully submitted, constitutes a denial of the obvious.

“Insolvency is an inability to fulfill one’s obligations according to his undertaking, and a general inability to answer in court for all liabilities existing and capable of being enforced, and not merely an absolute inability to pay at some future time, upon settlement of business”. (*First National Bank v. Walton*, 13 Colo. 265).

The term “insolvency” denotes the insufficiency of the entire property and assets of an individual to pay his debts. (*Phipps v. Harding* (C.C.A. 7th), 70 Fed. 468, 30 L.R.A. 513.)

We shall hereafter, in this brief, under Point No. 8(c) argue the question of whether or not the said "sale" constituted a fraud on the creditors and stockholders of the Holding Company.

POINT No. 6.

In its finding X, the trial Court found that on January 8, 1941, Merchants Ice was in an insolvent condition and about to collapse financially. It is respectfully submitted that this finding is wholly contrary to the evidence. The financial condition of Merchants Ice, at or about the end of 1940, is fully discussed under Part III (g) of this brief, and the Record testimony there quoted is incorporated herein.

Throughout its long history, and including the depression period, clear down to January, 1941, Merchants Ice never defaulted in a single obligation. (See testimony of O. H. Plagemann, R. 512.) Throughout the years 1937 to 1940 it had shown gradual and progressive improvement. (See testimony of Morrish, R. 457.) In 1939 it had enjoyed its best year in many years. (See testimony of Arnold, R. 881.) On June 30, 1940, the stockholders of the Holding Company were advised, in writing, by defendants Maffei and Arnold that there were reasonable possibilities of Merchants Ice going on a dividend basis in the very near future. (See Pl. Ex. 15, R. 205, quoted verbatim under Part II of the appendix hereto.) The net worth of the cor-

poration, as shown by the balance sheet dated December 31, 1940 (Pl. Ex. 31, R. 368) was \$1,199,136.50. The prospects and future of the company were increasingly bright as shown by the testimony of Will F. Morrish. (R. 486.) In view of this undisputed testimony we confess we cannot understand the finding of the trial Court that on January 8, 1941 Merchants Ice was insolvent.

The rest of finding X purports to find facts upon which could be based an argument or conclusion to the effect that the Holding Company, its creditors and receiver, are estopped from attacking the legality of the transaction of January 8, 1941. The trial Court, in this respect, ambiguously finds substantially to the effect that defendant Peter Bercut, relying upon the validity of the "purchase" made by him from the Holding Company, took over the management of Merchants Ice and thereafter loaned to it his credit, services and business ability, with the result that Merchants Ice prospered considerably and throughout this period of revival the Holding Company (then still under the control and supervision of the same defendants) acquiesced in such conduct and failed to protest or rescind the transaction. The trial Court concludes from this that plaintiff, as receiver, as well as the corporation, and its creditors, are now estopped from attacking the validity of the transaction.

The answer to this most unreasonable and erroneous finding and rule of law is to be found in the case of

Wing v. Dillingham, 239 Fed. 54, a case having some of the aspects of the case at bar. There a corporation had contracted to purchase certain lands, but because of financial difficulties it was unable to complete the payments. At a meeting of the directors in 1903, (six of whom were lawyers), at the urging of his co-directors, the defendant agreed to complete the payments, take title in his own name, and, if the corporation would repay him the sums advanced within six months, he was to convey the property to the corporation. A *resolution* reciting all of the facts was then adopted by the board and a contract entered into. Defendant performed the contract, but the corporation subsequently went into receivership. *Twenty months later* the receiver tendered to the defendant the amounts advanced by him and demanded a conveyance. The defendant contended that the corporation had only a *six months* option, which it had failed to exercise—and that the obligation to convey no longer existed.

In discussing the option contention of the defendant the Court, at page 58, said:

“The option, running for six months, from Wing to plaintiff, may be eliminated. For illustration: Say that no option to buy was granted, would this change the status? If the Oil Company held the legal title to the land in question, and made a fee simple conveyance to the defendant, would this aid or change the transaction? Surely not. *It has never been held that a director can buy anything of value from the corporation he serves,*

unless the purchase is fairly made and to the advantage of the company.

* * * One of the most frequent frauds perpetrated upon a corporation and its stockholders is where one or more of the directors purchase property from the corporation, directly or indirectly, or participate in the profits of such purchase. The law is well settled that a director's purchase of property from the corporation is voidable at the option of the corporation, even though the director paid fully as much as the property is worth. Cook on Corporations, 653."

So holding, the Court held that a *twenty months* delay by the receiver in attacking the validity of the transaction was not *unreasonable and did not constitute laches*.

The much quoted opinion of Chancellor Wolcott, rendered in *Loft, Inc. v. Guth*, 2 Atl. (2d) 225, and of St. Sure, J., rendered in *Blum v. Fleishhacker*, 21 Fed. Supp. 527, constitute a complete refutation of the propriety of such a finding and conclusion as was made in this cause by the Court below.

See, also, the case of *Hotaling v. Hotaling*, 193 Cal. 368, at 377, for a discussion of this same principle.

In concluding our argument on this point we should observe *that in our case the defendants were in control of the defrauded corporation* until the appointment of the receiver. Should the receiver now be held estopped because *the defendants did not sue themselves?*

POINT No. 7.

Findings XII and XIII of the trial Court are wholly contrary to the evidence, erroneous in fact, conclusion and the law of the case.

The trial Court in its findings XII and XIII did not find any ultimate fact. Instead, it found a legal conclusion to the effect that defendants Peter Bercut and Henri Bercut are lawfully possessed of the shares of Merchants Ice received by them pursuant to the transaction of January 8, 1941, and that the said transaction was in every respect a lawful, corporate act, binding upon the Holding Company, lawfully negotiated and consummated and hence did not constitute any conversion of the shares by the defendants. In essence, they are conclusions of law and not *findings* of ultimate facts.

These two findings, we assume, are directed to the second and third count of plaintiff's complaint, and an attack on the correctness of these two findings is really an attack on the propriety of the conclusions of law and judgment of the trial Court. This we shall do in our discussion under Point No. 8, *which point is the essence and gist of our appeal.*

POINT No. 8.

The conclusions of law and judgment of the trial Court are erroneous, not based upon any proper find-

ing of fact, and contrary to the law and equity of the case, on the following three main legal and equitable grounds.

- (a) The transaction of January 8, 1941, was not a valid, corporate act, legally binding upon Pacific Empire Holdings, Inc., its stockholders, creditors or receiver.

The by-laws of the corporation, in force and effect at the time of the transaction prescribing the powers and authority of the board of directors, the executive committee and the officers are cited herein under Part I of the appendix and set forth in full at pages 74p to 75i of the Record.

The five minute books of the Holding Company and of Empire Corp. in evidence (Pl. Ex. 2, 3, 4, 5, 6) clearly disclose that, on any matter or proposal of any importance, it was customary for the executive committee or board of directors of these corporations to meet, either in special session or by written waiver of notice and consent, for the purpose of passing upon, authorizing or ratifying any substantial transaction. The minutes will conclusively show that such proceedings were always had when it came to questions involving purchases or sales of any property; borrowing or lending of money; pledging of assets; or execution of guarantees or other obligations. If authority to do a certain transaction was not obtained prior it was, in every case, subsequently ratified by proper minutes and resolutions in the minute books. The minute books in evidence conclusively so indicate. (See

testimony of Maffei, R. 122, 132, 143, 153, 157, 163, 165, 167, 168, 175, 188, 189, 192 and 193.)

In the case of the Bercut transaction, however, *it is admitted that at no time has the executive committee, as a committee, or the board of directors, as a board, ever authorized, ratified or even considered the matter.* It is admitted (and heretofore discussed) that the stockholders have never been advised of the sale of the principal asset of their corporation, an asset carried on their books at more than \$650,000, constituting practically the only substantial asset of the company, and without which the company was practically out of business—and certainly insolvent. It is admitted that the only directors (of which there were then seven) who knew about the deal with Bercut were the defendants Maffei, Arnold and Bercut. Even director Webb Richards, *called as a witness by and on behalf of defendant Bercut*, testified that the first time he learned of the true facts of this deal was at the meeting of the board of directors, held August 20, 1942, which meeting was the first meeting of the board after the consummation of the Bercut deal, and at which meeting the board, *at its first opportunity, upon learning of the deal*, repudiated the transaction by consenting to the appointment of a receiver in equity whose immediate purpose was to proceed to attempt to recover from Bercut the shares of stock delivered to him by Maffei and Arnold. This repudiation was consistent with and pursuant to the power reserved

to the board of directors by virtue of Article VII, Sections 1 and 2 of the by-laws (R. 74w), dealing with the appointment and powers of the executive committee.

Certainly it cannot be argued that the president and secretary of this corporation had, by virtue of their office, the power, in their discretion, to dispose of substantially the only asset of the corporation. Such an argument would be not only contrary to the by-laws themselves—it, in fact, would be contrary to law itself and to all the reported cases and opinion of learned authors.

As a general rule, the president of a corporation has no authority, merely by virtue of his office, to effect a sale or encumbrance of any substantial part of the real or personal property of the corporation, and certainly not a general conveyance of the assets of the corporation.

See:

13 *Am. Juris*, (corporations), Sec. 904 page 882, and cases there cited;

Maryland Finance Corporation v. Duvall (C.C. A. 4th), 284 Fed. 764;

DeLaVergne Ref. Machine Co. v. German Savings Inst., 175 U.S. 40, 44 L.Ed. 65, 20 S.Ct. 20;

14 *L. R. A.* 358, 359.

The generally accepted rule of law with respect to the power of a president of a corporation is well ex-

pressed in Section 655 of 6a *Cal. Juris*—on corporations, where, on the authority of numerous cited decisions by our Courts, it is stated as follows:

“Although the president of a corporation is the presiding officer of the board of directors, he has, merely by reason of holding such office and in the absence of conferred or ostensible authority, no more power of management or disposal over the property and affairs of the corporation than any other single member of the board. ‘The general powers usually vested in the office of president’ conferred by a by-law, do not give general power to make contracts for the corporation. He has no power, merely because he is president, to bind the corporation by contract, but rather only such power as has been given him by the by-laws and by the board of directors, and such other powers as may arise from his having assumed and exercised authority in the past with the apparent consent and acquiescence of the corporation, or which are in the ordinary course and conduct of its business. *Thus, the president, merely by virtue of his office, has no power to mortgage corporate property, or alienate such property, or make executory contracts of sale binding upon its real property.*” (Italics ours.)

In *Andrew Jergens Co. v. Woodbury, Inc.*, 273 Fed. 952 (D.C. of Delaware, 1921), it was held that the president of an ordinary corporation has no power to enter into a contract the effect of which is to substantially divest the corporation of all of its assets.

In *Angelus Securities Corp. v. Ball, et. al.*, 20 Cal. App. (2d) 423, which is one of the latest expressions of our Appellate Courts (on a set of facts substantially similar to those presented in this appeal and dealing with a Delaware corporation doing business in California) we find the following statement at page 430:

“Appellant’s first contention is that the securities here in question belonging to the corporation could only be delivered to Ball or Luton and Cruickshank upon authorization of the board of directors, and that there is in the record no evidence of such authorization. The Delaware General Corporation Law (sec. 9, chap. 15, Rev. Code, 1915, as amended), in so far as here applicable, provides: ‘The business of every corporation organized under the provisions of this chapter shall be managed by a board of directors * * *’ The corporation, therefore, could act only through the medium of the board of directors, as prescribed by the statutory mandate. The evidence fails to disclose that any express authority was ever given to Harriss to enter into the transaction that resulted in paying out the corporation’s cash and securities. Also, the by-laws of the corporation gave to the president general and active management of the corporation, and to the treasurer the custody of the corporate securities in question. Luton and Cruickshank, who received the securities in question, occupied respectively these offices. These two officers, knowing that the securities in question had belonged to the corporation,

seeing the endorsement of Harriss on the securities transferring them to Ball, must have known or should have known, by reason of their official positions with the corporations, that Harriss had no authority from the governing body, the board of directors, to divest the corporation of these securities.”

As for the office of the secretary, it is elementary that, in the absence of special authority, it is purely ministerial.

Peter Bercut, being an officer, director and member of the executive committee of the corporation is, under the authority of *Bank of Wilmington v. Wollaston*, 3 Harr. 90 (Del. Ch.) *conclusively* presumed to have knowledge of the contents and provisions of the by-laws of the corporation, and of the powers, authority and duties of its officers. *He cannot exculpate himself by admitting, as he did on the witness stand* (R. 328), *that he would sign and approve minutes without reading them or knowing their contents.* In *Cutting v. Bryan*, 30 Fed. (2d) 754 (C.C.A. 9th, 1929), certiorari denied in 280 U.S. 556, it was held that where a director benefits from his own negligent inattention to the affairs of his corporation, he may be forced to do his duty by a Court of Equity which can order the corporation, which he is supposed to represent, to take some affirmative action as against him.

In *Dinsmore v. Jacobson*, 218 N.W. 700 (Mich. 1928) it was held that:

“One who has agreed to act as a director cannot excuse himself from negligence on the ground that the books of the corporation as well as the offices were at such a distance from his home that it was difficult for him to gain personal knowledge of the affairs of the corporation.”

As was stated in the very recent case of *Cowin v. Jonas et al.*, 43 N. Y. S. (2d) 468, the rule of law is that

“Good faith on the part of the directors practically never excuses a violation of duty, particularly when that duty is of express statutory nature.”

In *Hotaling v. Hotaling*, 193 Cal. 368, we have a case where the corporation had a board of *five* members. At a meeting of the board at which only *three* of the directors were present, a resolution was passed authorizing a conveyance of certain corporate real estate to one of the directors present at the meeting. An action to have the deed declared void was thereafter brought. At page 376 the Court states:

“Regarding the corporation as a separate legal entity and the deed under which Richard claims as an attempted corporate act, it must, we think, be conceded to have been invalid, at least in its inception, for the reason that its execution was never effectively authorized by the board of directors of the corporation, in whom was vested the sole power to give such authorization. (Civ. Code, sec. 305; *Gashwiler v. Willis*, 33 Cal. 11 (91 Am. Dec. 607).)”

In the case of *Alta Silver Mining Co. v. Mining Co.*, etc., 78 Cal. 629, at page 632, it was held:

“There is no corporate seal, and it affirmatively appears that there was no resolution of the board of directors. The president has not the power, by virtue of his office, to mortgage the property of the company (see generally *Bliss v. Kaweah C. & I. Co.*, 65 Cal. 502); nor has the secretary such power by virtue of his office (*Blood v. Marcuse*, 38 Cal. 594; 99 Am. Dec. 435); nor have both together the power which neither has separately; nor have the stockholders such power. (*Gashwiler v. Willis*, 33 Cal. 12; 91 Am. Dec. 607.) The powers of a corporation must be exercised, and its property controlled, by its board of directors (Civ. Code, sec. 305); the decision of a majority of the directors, ‘made when duly assembled,’ being valid as a corporate act. (Civ. Code, sec. 308.) The board must be ‘duly assembled’. (*Harding v. Vandewater*, 40 Cal. 78.) And their transactions should be recorded. (Civ. Code, sec. 377; *Southern Cal. Ass’n v. Bustaments*, 52 Cal. 192.) The directors when not acting as a board have not the necessary power. (*Gashwiler v. Willis*, 33 Cal. 18; 91 Am. Dec. 607.) The absence of a resolution of the board renders the instrument invalid. (*Southern Cal. Ass’n v. Bustaments*, 52 Cal. 192.)”

In *Citizens Securities Co. v. Hammel*, 14 Cal. App. 564, we have a case where a corporation had a board of *nine* directors. At an informal meeting of the board, *not called for the purpose*, at which meeting only *seven* directors attended, a resolution was passed

authorizing the pledging and mortgaging of certain personal property to a creditor as security for unpaid rent. In a subsequent controversy over the property between the mortgagee and a creditor of the corporation, the said mortgage was held invalid. At page 568 the Court states its reasons in the following language:

“It must be conceded that the executive or managing officers of a corporation have not the authority, without instructions from the board of directors, to pledge or mortgage the property of the corporation for antecedent debts. Especially would this be true of one simply a director of such corporation. The right of the board of directors to pledge or mortgage the property even for antecedent debts must be admitted, but that such board may authorize such act it is necessary that they be in session at a meeting lawfully assembled. *Plaintiff relying, as it must, upon the right of possession, as conferred upon it by the board of directors, must affirmatively show facts from which such authority may be reasonably inferred.* Seven members of the board out of a total membership of eleven, notwithstanding they constitute a majority, would not have authority to pledge the property of the corporation for an antecedent debt, unless they were legally assembled for the purpose of transacting corporate business. There is nothing in the record to indicate that this board was so assembled at the time plaintiff claims the authority was given. *In addition to this, we are of opinion that some action in the nature of a resolution would be necessary*

in order to warrant an officer of the corporation in thus pledging corporate property. The resolution need not necessarily be spread upon the minutes, if actually passed, but a conversation simply between four members—the other three present not being shown to have participated therein, nor in fact to have been aware of such conversation—is far from showing any resolution or authority upon the part of the board.” (Italics ours.)

In the case of *Ames v. Goldfield Merger Mines Co.*, 227 Fed. 292, we have a case singularly alike to the case at bar. The facts of the case, as briefly outlined in the headnotes, were found to be substantially as follows:

“The directors of a mining company met but four times in four years, and did not call a stockholders’ meeting for more than three years, during which time the company expended \$250,000 which was practically all of its available funds, and also sold property for \$50,000 which a short time afterward was worth \$500,000. All of such business was transacted without authority from the directors, by officers who were also officers or employes of other mining companies having the same majority stockholders. The work done was not calculated to, and did not, benefit the company, but did benefit the other companies.”

At page 301 District Judge Neterer states the rule of law applicable to such a case to be:

“The stockholders of a corporation have a right to expect from their directors a conscientious con-

sideration of every proposition which is presented which involves any interest of the company, in conformity to the oath which they have subscribed. They have a right to have the individual viewpoint of the several directors expressed at a conference, for the purpose of obtaining the exchange view of the several persons in arriving at conclusions after deliberate consideration of any issue. It is fundamental that officers of boards can only act as such constituted boards when assembled as such, and by deliberate and concerted action dispose of the issue under consideration, and that they cannot act in an individual capacity outside of a formal meeting."

It was consequently held that on such facts the minority stockholders were entitled to the appointment of a receiver for the corporation.

In the case of *In re Webster Loose Leaf Filing Co.*, 240 Fed. at page 779, we have a situation where a corporation managed by three directors agreed to give a chattel mortgage on all of its property to one of its directors to secure *an actual* loan of \$10,000 made to the company by the mortgagee.

The evidence showed that no formal meeting of the board of directors was ever had to approve or authorize the execution of said chattel mortgage. At page 787 the Court states:

"It appears therefore that this mortgage for \$10,000 covering all the property of the corporation was authorized, not at any meeting regularly and legally called of the directors, but was the

result of a private agreement which Roberts and Webster made after discussing the matter from time to time as they met in the regular course of their business at the office of the corporation, or at the office of Roberts in New York, and Webster says this is exactly what happened. *If this be true, the mortgage in question therefore was never legally authorized, and is therefore invalid for that reason.*" (Italics ours.)

In *U. S. Fire Apparatus Co. v. G. W. Baker Machine Co.*, 10 Del. Ch. 421, 95 Atl. 294 (1915), it was held that the directors of a corporation must act as a board and not as individuals; that neither a quorum nor a majority can act in any way other than through a duly convened meeting and their individual consent to a contract without a meeting is not the consent of the board, and where there was neither a meeting of the directors of a corporation nor a resolution authorizing a sale it was held that such a transaction was void.

To the same effect as above is the case of *Mattoax Leather Co. v. Patzowsky*, 2 Boyce 327, 80 Atl. 241 (1911).

In *Bowen v. Imperial Theatres, Inc.*, 13 Del. Ch. 120, 115 Atl. 918 (1922), it was held that, where two directors authorized the issuance of stock of a company in consideration of a certain contract but the board consisted of three directors and in that case the third director had no notice and did not participate in the transaction, the said transaction was void for the

reason that the corporation was deemed entitled to the benefit of the judgment of the third director.

In *Bruch v. National Guarantee Credit Corp.*, 13 Del. Ch. 180, 116 Atl. 738, it was held that where the by-laws of a corporation provided that the board of directors shall consist of seven members and a majority shall be necessary to make a quorum the vote of three directors was deemed insufficient to authorize the president to file an answer admitting the allegations of a bill seeking the appointment of a receiver, *although in that case it was proven that there were four vacancies on the board.*

So much for the decided cases, but it is appropriate to observe here that the articles of incorporation of Pacific Empire Holdings, Inc. and the by-laws (in evidence) gave power to the board of directors to sell all of the property of the corporation *upon consent of the holders of a majority of the outstanding stock having been first obtained.* This provision is in accord with and follows Section 65 of the Delaware General Corporation Laws, which section requires such stockholders' consent. Now, it is elementary that the word "all" as used in such statutes does not mean *literally all* of the assets of a corporation, but means *substantially all* of the assets.

The learned Chancellor Wolcott, in his now famous opinion rendered in *Loft, Inc. v. Guth*, 2 Atl. (2d) 225, at page 245. Had occasion to pass upon the contention of the defendant, Guth, to the effect that the

board of directors of Loft, Inc. knew all about the transaction and had authorized him to take it in his individual capacity for the reason that the corporation was not financially able to take it itself. The Court disposed of this argument by showing that there was nothing in the records of the corporation to substantiate it and said:

“The defendants contend that it is not indispensable to corporate action that a formal vote be taken by the directors and recorded in the minutes of their meetings. Accordingly, they say, the absence of any minute recording an authority to Guth to commit Loft to the financing of Pepsi, is not conclusive that no such authority was given. Knowledge on the part of the directors and their unrecorded consent, or even absence of objection on their part accompanied with knowledge that one is dealing with the corporation on the assumption of the corporation’s agreement, the defendants contend, are as sufficient to bind the corporation as if its directors had adopted a formal binding resolution. The defendants cite cases in support of the proposition. *The cases so cited are in the main if not entirely cases involving the dealings of third parties with the corporation and therefore clearly not relevant to a case such as this, where the corporate dealings are with the corporation’s director-president who is in complete control of its affairs and in a position of dominance over its board.*

I shall not review those cases. It is not necessary for me to do so for this, if for no other reason, that my conclusion is that though some of the

directors knew that Guth was interested in Pepsi, none of them, excepting possibly Masters, who was treasurer, knew that Guth was drawing upon Loft for practically the entire financing of Pepsi. If they did know it and authorized it, they were clearly breachers of the trust confided to their keeping. Directors who either through friendship for the president of a corporation or for fear of his displeasure or for any other reason, authorize him to use the corporate resources committed to their management or control for the promotion of his own personal projects, are participants in a fraud. As they have no power to authorize the fraudulent acts, so they are equally devoid of power to ratify them. This court has held that a majority of even the stockholders has no power by ratification to bind the corporation to a fraud committed upon it by its officers and directors. *Eshelman et al. v. Keenan et al.*, Del. Ch. 187 A. 25. The authorities therein cited in support of the rule may be supplemented by *Continental Securities Co. v. Belmont*, 206 N.Y. 7, 99 N.E. 138, 51 L.R.A. N.S. 112, Ann. Cas. 1914A, 777; and *Smith v. Bunge*, 272 Ill. App. 182, affirmed, 258 Ill. 229, 193 N.E. 122. A fortiori it must be true that directors who authorized the wrong are without power to validate it by their own ratification." (Italics ours.)

In view of the foregoing authorities and hundreds of substantially similar decisions by the Courts of every jurisdiction, how can the Bercut transaction be possibly held to be a valid corporate act? Mr. Maffei, as president, and Mr. Arnold, as secretary, by

virtue of their office, had no power or authority to dispose of substantially the only real asset of the corporation. Such a transaction certainly does not come within the general scope of their power or authority. The by-laws did not vest them with any such authority. The usual course of business of the corporation, as shown by the minute books in evidence, denies to them any such authority. The three directors who constituted the executive committee merely agreed, informally, among themselves, to transfer this most valuable asset to one of themselves, without saying a word to anyone else, and without even taking the precaution of at least calling a meeting of the committee which they constituted, or of making a note of the transaction in the minute book of the corporation.

The defendants argue that, in view of the fact they constituted the executive committee, why bother about such a simple proposition as calling a meeting just for the purpose of passing a resolution and making it a part of the minute book. Is it not sufficient, so they contend, that the three of them put their signature on the document dated January 8, 1941? It is fortunate for the creditors and stockholders of corporations generally that the Courts of every jurisdiction have consistently refused to lend any support to such specious, if not actually dangerous, reasoning, otherwise plain and simple larceny and embezzlement of corporate property by corporate officers would automatically become legal by their mere execution of a paper, in the name of the corporation, to themselves,

followed by their own ministerial affixment of the corporate seal.

But, by way of irrefutable answer to such an illogical and legally unsound argument, we need only point out that when Peter Bercut elected to take his chances on the assumption that the transaction had been approved, though informally, by the executive committee, he did so with the knowledge that under the by-laws the board of directors, at its next meeting, had the right to disaffirm the acts of the so-called executive committee. Giving to Bercut all of the benefits of his most unsalutary contention—the undisputed facts in this case are—that the corporation's board of directors, at the first meeting held thereafter, namely, August 20, 1942, at the very first opportunity presented to the board, emphatically disaffirmed the deal by its approval of the appointment of a receiver for the company whose first act was to repudiate the deal and seek to recover for the company this most valuable asset.

Hence, we respectfully submit that the defendant Peter Bercut and his brother Henri Bercut, his partner in the deal (R. 390), have acquired no valid title to the stock in issue as the result of the January 8, 1941 deal.

(b) The January 8, 1941 transaction is void because it constitutes a flagrant breach of trust by fiduciaries.

The case at bar is unique in that in none of the hundreds of reported cases, dealing with breaches of fiduciary duties by corporate officers or directors, have we been able to find one so flagrant, so brazen and cold blooded in character.

The evidence adduced at the trial of our case has disclosed a systematic looting, over a period of years, of every corporation which came under the baneful influence of the defendants. Not a single corporation with which the defendants Maffei, Arnold and Peter Bercut had anything to do was left unstripped. The cold bloodedness with which these men disposed of the assets of Pacific Empire Holdings, Inc., Pacific Empire Corporation, Merchants Ice and Cold Storage Company, California Pacific Service, Inc. *and even the trust assets belonging to the stockholders of the City National Bank, in course of liquidation, is appalling.* The story of their systematic depredations, unfolded in Court, was and is almost unbelievable. Creditors and stockholders, as far as these men were concerned, were mere unavoidable nuisances. And throughout the entire history of corporate looting disclosed to the Court we find the defendant Peter Bercut to be one of the small, intimate group of directors actually managing these corporations. Maffei, Arnold and Bercut constituted the trio operating and mismanaging these companies. Nor can

Peter Bercut exonerate or exculpate himself by taking the witness stand and testifying that, although his bookkeeper had advised him the financial reports of these companies were "bogus" (R. 329), nevertheless he would sign and approve minutes of meetings of board of directors and of executive committees (at which, he says, he was not present or were not held) without even reading them. (R. 327.)

As ultimately happens in all such cases, these faithless trustees and the corporations managed and looted by them, came to the inexorable end of their tortuous road. They finally found themselves in the trap which they had inadvertently created for themselves. On November 20, 1940, the United States obtained a judgment against Pacific Empire Holdings, Inc. for a sum in excess of \$11,000. The company had no assets left, other than shares in subsidiaries, which had likewise been looted and left devoid of any assets, and a block of 12,495 preferred and 65,863 common shares of Merchants Ice and Cold Storage Company. These men knew that an execution issued upon said judgment and levied on the shares of Merchants Ice and Cold Storage Company would result in the control of this company passing to "unfriendly hands", followed by an exposure of their systematic depredations.

So the defendant, L. R. Arnold, who in the meantime had caused himself to be denominated "executive vice president" and, who, at the time, was also presi-

dent of Merchants Ice and Cold Storage Company, and personally responsible for the juggling of the books of that company, hastened, "under pressure", as he termed it, to place the more than 78,000 shares of Merchants Ice and Cold Storage Company into the hands of one who, not only had money and could rehabilitate that company, but one who could be relied upon not to be unfriendly to Arnold and Maffei. That man, possessed of these indispensable qualifications, was Peter Bercut, their intimate associate, since 1930, in the mismanagement of these companies.

It is obvious, to even a schoolboy, that, to L. R. Arnold and Maffei, it had become imperative that Peter Bercut take over the controlling interest of Merchants Ice. Only in that way could they reasonably expect at least a deferment into the future of the inevitable consequences of their misconduct. Irrespective of what defendant L. R. Arnold says about the "pressure" which compelled him to finally accept the "generous and magnanimous" offer of \$35,000 made to him by Peter Bercut, for an asset valued at over \$650,000, and *then* reasonably worth at least \$300,000, it is obvious that the motivating pressure was the imperative necessity of having a "friend" in charge of Merchants Ice. That is the only possible reason why they did not even deem it advisable to talk to anyone else about the deal, or seek to obtain from other interested parties a better price for the block. Why, at the time they owed Kohler & Chase (a very

wealthy concern) almost \$15,000 in back rent, and although they had been told by Mr. Chase that he was interested in acquiring this block of Merchants Ice stock, should it be decided to sell it, nevertheless they studiously kept away from him, even though Arnold and Maffei admit that Bercut's offer was not at all satisfactory to them. (R. 875, 231.)

Why the hurry to close with Bercut? Why the secrecy? Why the failure to try to obtain a better price from other sources? Simply and purely because they felt it would be inadvisable to let the control of the company pass into the hands of anyone who might be inclined to bring them to account.

Defendants Maffei and Arnold felt safer in dealing with Bercut. He had been one of them. He knew the terrible financial plight of all these companies. He had money and credit and he could reasonably be expected not to be unfriendly. In other words, to Arnold and Maffei, it became apparent that by putting this block of stock in the hands of Peter Bercut, instead of a stranger, their house of cards might yet not collapse upon them.

And as for Peter Bercut, why he knew well the situation. For years he had gone along with them, watching the looting and mismanagement going on without protest. (R. 327.) On the contrary, he would sign and approve transactions without even going to the meetings or reading the minutes. He well knew that sooner or later they would have to come to

him (R. 337), since he was the only one in the family with plenty of money and credit.

So, when around November 20, 1940, the defendant L. R. Arnold finally approached him with a proposal for him to take over a half of the holdings of Pacific Empire in Merchants Ice, he, Peter Bercut expresses no interest. But eventually he makes an offer of \$35,000 for the whole block—because—so he testified, he had to have the *control* of Merchants Ice, or nothing. (R. 341.) At this point he completely forgot that he was then and there a fiduciary of all these companies. *He completely forgot that, as an officer and director of all these companies, and as a member of a small executive committee, he owed the duties of a trustee to the creditors and stockholders of all these companies.*

He cared nothing for them. He admitted on the stand that these companies were busted anyhow—and had been for a long time—and the creditors and stockholders of these companies had nothing coming anyhow. (R. 337.)

So, caring only for Peter Bercut, and being exclusively desirous of acquiring this block of stock—at the very lowest possible figure (instead of being insistent that the corporation dispose of the stock at the highest obtainable price) he finally offered \$35,000 to Arnold, of which sum, he required that \$25,000 be immediately paid back to *his* new company, Merchants Ice. And when Arnold asked for more

—why—Bercut went south for a vacation. (R. 848.) When he came back his offer was still the same, and Arnold and Maffei, being then “under pressure” (though Mr. Gaither of the Pacific National Bank testified that there was no pressure from his bank where all the loans were then carried) hastily dictated to Peter Bercut a letter, under date of January 8, 1941, placed the name of Pacific Empire Holdings, Inc. at the bottom, then Maffei signed as president, Arnold signed as secretary and the corporate seal was affixed. *Peter Bercut was in such a hurry that he did not even sign where he was supposed to sign—under the word “accepted”.* (Pl. Ex. 22, R. 224.) *But he did receive the stock* and the evidence discloses that Pacific Empire Holdings, Inc. received the *net* sum of about \$4000 from the deal; some of which was used to pay a part of the back rent due to Kohler and Chase, and the balance, we suppose, must have gone to pay the salaries of defendants Maffei and Arnold.

Mr. Bercut thereupon takes over the management of Merchants Ice—the stock becomes his—and creditors owning \$300,000 in claims against the holding company, including the United States government, and more than 8000 stockholders are left holding the bag. Immediately thereafter Merchants Ice starts to make and thereafter continues to make greater and greater profits. So much so that the stock of Merchants Ice acquired by Bercut from the holding com-

pany is now considered by him to be so valuable that he would not say on the witness stand whether he would take one million dollars for it. He said he would not sell it, because—so he said, “he owed a duty to his stockholders”. (R. 344.) It is remarkable that all of a sudden Peter Bercut should feel any duty to his stockholders considering how callously and ruthlessly he discharged his fiduciary duties toward the stockholders and creditors of Pacific Empire Holdings, Inc. and Pacific Empire Corporation.

The extent of his consideration of the rights of his creditors and stockholders is expressed in the so-called “option” given by him to the company to reacquire from him, within two years, 20,000 shares of *common* stock at 50 cents a share. Knowing full well that the company had no assets left, after the deal, with which to exercise such option, he took the *precaution* of providing that it should be *non-assignable* and, to make doubly sure that the option should never be exercised, he provided that the voting rights as to such 20,000 shares should remain, in any event, with him for seven years. This was the extent to which the defendant Peter Bercut felt he should go in discharging his fiduciary obligations to the creditors and stockholders of the companies of which he was an executive officer and director. (R. 874, 232.)

We repeat, such a brazen, flagrant and calculating breach of trust on the part of a fiduciary has not

been observed by any of the writers of this brief in any of the reported cases. In our humble opinion the transaction, which is the subject of this cause, is one that not only is invalid *per se*—but is of the class generally cognizable in the criminal Courts. (See *Italo Petroleum etc. v. Hannigan*, 40 Del. 534, 14 Atl. (2d) 401.)

We have not been able to discover a reported case in all the law books that would support a corporate transaction of this character. All the text writers of corporation law emphatically condemn them. The decisions of our state and federal Courts are unanimous in refusing to give to such transactions any color of legality.

Let us examine just a few of the leading decisions bearing upon this aspect of the case.

Undoubtedly one of the leading cases on this phase of the law is *Guth v. Loft, Inc.*, 5 Atl. (2d) 503 (affirming in toto the opinion of the Chancellor rendered in *Loft, Inc. v. Guth*, 2 Atl. (2d) 225). The case dealt with a bill in equity, described in the opinion of the Chancellor as follows:

“Briefly described, the gravamen of the bill is that Guth, while he was the president and the controlling influence in Loft, Inc., caused a certain very desirable business proposition which was made to him as the president of the complainant, to be diverted from the complainant to a newly formed corporation, the defendant Pepsi-

Cola Company, most of the shares of the capital stock of which he and his personal holding corporation, the defendant The Grace Company, acquired."

The complaint sought to have a judgment of the Court decreeing that all of the stock of Pepsi-Cola Company then directly or indirectly owned by Guth and Grace equitably belonged to Loft, Inc. It was also prayed that the defendants be ordered to account for any profits earned by them as the result, during the period of time, of their holding the Pepsi-Cola stock in their name.

Chief Justice Layton, in affirming the decision of the Chancellor awarding judgment to the plaintiff, in the course of his opinion, at page 510, stated as follows:

"Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to

the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or enable it to make in the reasonable and lawful exercise of its powers. The rule that required an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest. The occasions for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale.

“If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefit and profit. *The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation. Given the relation between the parties, a certain result follows; and a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty.* Lofland et al. v. Cahall, 13 Del. Ch. 384, 118 A. 1; Bodell v. General Gas & Elec. Corp., 15 Del. Ch. 119, 132 A. 442, affirmed 15 Del. Ch. 420, 140 A. 264; Trice et al.

v. Comstock, 8 Cir., 121 F. 620, 61 L. R. A. 176; Jasper v. Appalachian Gas Co., 152 Ky. 68, 153 S. W. 50, Ann. Cas. 1915B, 192; Meinhard v. Salmon, 249 N. Y. 458, 164 N. E. 545, 62 A. L. R. 1; Wendt v. Fischer, 243 N. Y. 439, 154 N. E. 303; Bailey v. Jacobs, 325 Pa. 187, 189 A. 320; Cook v. Deeks (1916), L. R. 1 A. C. 554.

“The rule, referred to briefly as the rule of corporate opportunity, is merely one of the manifestations of the general rule that demands of an officer or director the utmost good faith in his relation to the corporation which he represents.”

The case of *Guth v. Loft*, supra, was cited with approval by Mr. Justice William O. Douglas in the case of *Pepper v. Litton*, decided in 1939, reported in 308 U. S. 295. At page 306 of the opinion Mr. Justice William O. Douglas lays down a statement of law which would seem to preclude, on its face, any legal or equitable right on the part of Peter Bercut to the stock of Merchants Ice & Cold Storage Company in question. The statement is as follows:

“A director is a fiduciary. *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 588. So is a dominant or controlling stockholder or group of stockholders. *Southern Pacific Co. v. Bogert*, 250 U. S. 483, at 492. Their powers are powers in trust. *Jackson v. Ludeling*, 21 Wall. 616, at 624. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is chal-

lenged, the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. *Geddes v. Anaconda Copper Mining Co.*, 254 U. S. 590, 599. The essence of the test is whether or not under all the circumstances it carries the earmarks of an arm length's bargain. If it does not equity will set it aside. While normally the fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action, it is in the event of bankruptcy of the corporation, enforceable by the trustee. For the standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation; creditors as well as stockholders." (Citing authorities.)

And, at page 311, at the end of his opinion, Mr. Justice William O. Douglas lays down what he considers to be the commandments binding upon a corporate officer and director, namely:

"He who is in such a fiduciary position cannot serve himself first and his cestuis second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted

outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation."

We respectfully submit that the defendants, especially Peter Bercut, have, under the evidence of the case, violated every one of Mr. Justice Douglas' precepts, and it is now for this Court, sitting as a Court of Equity, to carry out the last commandment.

The decision of Chancellor Wollcot in *Guth v. Loft*, supra, was also cited by Chief Justice Layton of the Delaware Supreme Court in the very recent case of *Italo Petroleum Corp. v. Hannigan*, 40 Del. 534, 14 Atl. (2d) 401, in support of his reversal of a judgment obtained against the corporation in the lower Court.

In the well reasoned case of *Garden Valley Development Co. v. Warren Ranch* (Sup. Ct. of Arizona), reported in 276 Pac. 839, we have a situation where a stockholder brought suit to cancel a lease obtained from the corporation by another corporation in which latter the president of the lessor corporation was financially interested. The suit to cancel the lease was based on the claim that it was grossly unfair to the lessor corporation. In discussing the principle of law involved, Chief Justice Lockwood, at page 842, states:

“We come, then, to the vital issue of the case. Was the lease, under all the circumstances appearing in the evidence, of such a nature that as a matter of law it is voidable at the suit of plaintiff? There are three rules prevailing in regard to the validity of transactions wherein the director of a corporation participates and has a personal interest therein. The first is that all such, regardless of their fairness, are subject to rescission at the suit of any stockholder. *Morgan v. King*, 27 Colo. 539, 63 P. 416; *Transvaal Lands Co. v. New Belgium Land & Development Co.* (1914), 2 Ch. Div. 488-503; *Purchase v. American Safe, etc. Co.*, 81 N. J. Eq. 344, 87 A. 444. The second is that unless the transaction was authorized by the majority of a wholly disinterested quorum the transaction will be set aside. In other words, if the vote of the interested director was necessary to constitute a quorum or to pass the resolution, the transaction may be voided, regardless of its fairness. *Curtin v.*

Salmon River, etc. Co., 130 Cal. 345, 62 P. 552, 80 Am. St. Rep. 132; Sacajawea Lumber, etc. Co. v. Skookum Lumber Co., 116 Wash. 75, 198 P. 1112; In re Webster Loose Leaf Filing Co. (D. C.), 240 F. 779-785. The third rule, which has been approved by this court, is that the transaction will be closely scrutinized and will be set aside upon the slightest evidence of unfairness. Dragoon Marble, etc. Co. v. McNeish, 28 Ariz. 96, 235 P. 401; Phoenix Title & Trust Co. v. Alamos Land & Irrigation Co., 24 Ariz. 499-506, 211 P. 570-572."

In conclusion, the Chief Justice found that the lease was unfair to the stockholders of the lessor corporation, and he held, therefore, that even under the lenient rule adopted by the Court, it was properly cancelled.

In *Frankford Exchange Bank v. McCune*, 72 S. W. (2d) 155, a decision by the Supreme Court of Appeal of Missouri, we have a case where the Finance Commissioner (who had taken over plaintiff bank above named on its insolvency) brought suit against the directors of the bank to recover certain assets of the bank turned over to its seven directors to indemnify them against loss for their having gone surety on one of the bank's bond. To become depository of county funds, the bank had to give the county a bond. The evidence disclosed that after using corporate surety for several years, the bank, in order to

save bond premiums, induced the directors to go bond for the bank, and it pledged to the directors assets sufficient to protect them.

The trial Court found there had been absolute good faith and no fraud, and that the suretyship had been undertaken by the directors on express understanding of guarantee; that the bank received benefit from the action and would suffer no detriment if defendants' title to the assets was affirmed. Nevertheless, the Court invalidated the agreement because of the personal interest of the directors in the contract, and gave as its reasons for setting the transfer aside, as follows (page 158):

“In this particular case it is very likely true, as the lower court found, that defendant had no idea of defrauding the bank, and in fact undoubtedly thought that they were aiding it (though at no risk to themselves), but nevertheless they were drawing assets from the bank which belonged to it, and were securing for themselves a preferred status in contravention of the rights of others, who, upon the bank's failure, were equally entitled to look at the same assets as security for their own claims. Of course, it is true that in the present situation the general creditors of the bank are no worse off than they would have been if government or state bonds of equal value had been pledged with the county by the bank, as it would have had the right to have done. *But be this as it may, the law, in placing its*

stamp of disapproval upon the maintenance of inconsistent positions by corporate officers, does not pause to inquire whether the contract or transaction was fair or unfair, nor does it undertake or attempt to consider the question of abstract justice in the particular case. Rather, it stops its inquiry when the inconsistency of position is disclosed; it sets aside the transaction, or refuses to countenance it, when it is the product of a dual undertaking; and thus, in so far as may be, it prevents the accomplishment of frauds by making them impossible at the outset." (Italics ours.)

It should be noted, however, that even in those cases where the contract is held to be valid if entered into fairly and in good faith it is universally held that the dealing between the corporation and the interested director must be at arm's length, and there must be a proper corporate action on the proposition followed by specific authorization by the board of directors acting formally without counting the vote of the interested director. Thus in *Veesser v. Robinson Hotel Co.*, 275 Mich. 133, 266 N. W. 54, it was held that the rule which permits a director of a corporation to deal with it even in good faith, is *limited* to those cases where the corporation is represented by a quorum of disinterested directors or other independent officers or agents *authorized* to contract for it. *This rule of law is likewise the California rule. See Union Die*

Castling Co. Ltd. v. Andersen (1938), 25 C. A. (2d) 195 at 201, and Sec. 311 of *Civil Code*.

In *San Francisco Water Co. v. Pattee*, 86 Cal. 623, the plaintiff water company was only semi-active; the financial condition necessitated periodic contributions by the officers for taxes and bills, no assessment being levied. Defendant was its secretary. He claimed he resigned in August, 1878. Plaintiff claimed he was active till January, 1881. In 1878 the company had debts and no funds. The officers refused to assess or contribute further. They authorized borrowing but no loan could be obtained. Defendant told the president and the attorney, who was also a director, in August, 1878, he would no longer act as an officer and director, and made a pencil entry in the books of his resignation, but it was not acted upon.

At an execution sale held on a judgment obtained by a creditor against the corporation, the defendant, by his agent, bought in the property.

No one but the attorney, who was sold a one-half interest in the property at cost, was told of these matters until January 4, 1881, when at a meeting of the directors the defendant disclosed the facts. His purchase was repudiated and a tender of his expense was made and refused.

The Court impressed the property acquired by the defendant, as aforesaid, with a trust and directed him

to reconvey the property to the corporation. At page 629 the Court said:

“It is also claimed for this defendant that his relations to the company were not of a fiduciary character, and that even if they were, he was not for that reason forbidden by law to buy in the property for his own benefit, at a forced sale not made by himself or at his instigation.”

“The terms of the by-laws make him in large degree the general agent and manager of the corporation. The supervision of nearly all its affairs was committed to him, and the evidence shows very conclusively that during many years, while the corporation was in a state of inactivity, he was its head and front; it had no knowledge of its own affairs except as he gave it, and met or moved only as and when he suggested. He was therefore bound to act towards the corporation in the highest good faith, and was not at liberty to obtain any advantage over the corporation by concealment from its directors of the true condition of its affairs. (Civ. Code, sec. 2228.) Under section 2230 of the same code he had no right to take part in any transaction concerning the property of the corporation, all of which was practically in his keeping, adverse to the interests of the company, without the consent of its directors, given upon full knowledge of the facts. If he did so, it was a fraud against the company (sec. 2234) and if by doing so he acquired any interest adverse to the interest of the company, it was his duty to give immediate in-

formation thereof. (Civ. Code, sec. 2233. See also *Baker v. Whiting*, 3 Sum. 475.)”

To the same effect as the foregoing cases are:

Kahle v. Stephens, 214 Cal. 89;

Pasadena Mercantile Finance Corp. v. De Besa,
122 Cal. App. 575;

Union Die Casting Co. v. Anderson (1938), 25
Cal. App. (2d) 195 at 201.

Turning now to our own local Federal District Court, we have the leading and often approved opinion of Judge St. Sure, rendered in *Blum v. Fleishhacker*, 21 Fed. Sup. 527 (District Court, N. E. Calif. 1937).

With respect to the question of burden of proof, we again cite *Veaser v. Robinson Hotel Company* (supra) (Sup. Ct. of Michigan, 1936), 266 N. W. 54, where the Court, in setting aside a transaction between two directors on one side and the corporation on the other, at page 55, remarked:

“The directors of a corporation stand in a fiduciary relation to the corporation and to its creditors. They may deal with it if their acts are open and above board and known to the directors, and the director dealing with the corporation is not in control thereof. *Barnes v. Spencer & Barnes Co.*, 162 Mich. 509, 127 N.W. 752, 139 Am.St. Pre. 587; *Quinn v. Quinn Mfg. Co.*, 201 Mich. 664, 167 N.W. 898; *Patrons’ Mutual Fire Ins. Co. v. Holden*, 245 Mich. 493, 222 N.W. 754.

The statute provides that no contract made with any director shall be invalid because of that fact alone. Act No. 327, Sec. 13, subd. 5, Pub. Acts 1931. *But when the validity of such contract is questioned, the burden of proving the fairness to the contracting parties of any such contract is upon such director, or other person, or group, or corporation, who asserts the validity of such contract. Ibid.*

The rule which permits a director of a corporation to deal with it, even in good faith, is limited to those cases where the corporation is represented by a quorum of disinterested directors or other independent officers or agent authorized to contract for it. 14a C.J. 119, 120. *And, even then, the burden of showing the validity of the contract and the fairness and honesty of the dealings of the director with the corporation is on him. Patrons' Mutual Fire Ins. Co. v. Holden, supra."* (Italics ours.)

Hence, we respectfully submit, on the strength of the foregoing authorities and universally accepted principles of law, that the transaction of January 8, 1941 was legally void as to the corporation.

(c) The transaction of January 8, 1941 is void because it constitutes a flagrant fraud on creditors.

Our Civil Code Section 3439.04 (enacted June 20, 1939 as part of the Uniform Fraudulent Conveyance Act) provides that:

“Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration”;

and Section 3439.07 of the Civil Code provides:

“Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud present or future creditors, is fraudulent as to both present and future creditors.”

There certainly can be no dispute as to the fact that upon there having been delivered to Peter Bercut the block of Merchants Ice shares owned by Pacific Empire Holdings, Inc. said corporation automatically became insolvent. The evidence discloses that at the time the corporation had approximately \$300,000 in debts, including a *judgment* claim in excess of \$11,000 obtained by the United States for unpaid taxes. The evidence is also conclusive that with the transfer of the Merchants Ice shares to Bercut the corporation's remaining assets were nominal while its subsidiary, Pacific Empire Corporation

retained in its portfolio, as its only asset (other than pledged shares of Pacific National Bank of San Francisco) the uncollectible notes of the holding company. It cannot be denied, we take it, that the insolvency of Pacific Empire Holdings, Inc. resulted directly from its parting with its investment in Merchants Ice and Cold Storage Company, for a *nominal* consideration.

Furthermore, the evidence disclosed that the true motivating "pressure" compelling the making of the deal was the fact that, as the defendant Maffei testified, they were very much worried over the judgment obtained against the company by the United States on November 20, 1940, a judgment which the company could not pay other than by a disposal of the Merchants Ice stock. Such being the undisputed facts, the transfer of this block to Peter Bercut for a nominal consideration cannot be looked upon other than a deliberate act intended to and which resulted in defrauding the government of the United States out of the benefits of its judgment lien. And since Peter Bercut was then an officer, director and member of the executive committee he stands tainted with the same degree of fraud as the defendants Maffei and Arnold. See *Rossen v. Villanueva*, 175 Cal. 632. One is guilty of fraud as to his creditors in doing that which the law deems fraudulent, even though he may not be conscious of the fact that he is committing any wrong. See *Sukeforth v. Lord*, 87 Cal. 399, at 408; 25 Pac. 497.

It has been held that a transfer, not in the ordinary course of business, made by an insolvent, whose condition is known to the transferee, is sufficient to place upon the parties to the transfer the burden of proving that it was not fraudulent. (See Sec. 31 of 12 Cal. Juris. on Fraudulent Conveyances, for the cited authorities and rule of law.)

It has also been held that inadequacy of consideration may be coupled with other circumstances so compelling in their nature that the inference of fraudulent intent is irresistible. See *Denehy v. Stewart*, 41 Cal. App. 88, at page 98; 181 Pac. 839. These circumstances are generally denominated as "badges of fraud" and the rule is well expressed in Sec. 133 of 27 Corp. Juris. on Fraudulent Conveyances in the following words:

"There are circumstances so frequently attending conveyances and transfers intended to hinder, delay and defraud creditors that they are denominated 'badges of fraud'. These 'badges of fraud' do not in themselves or per se constitute fraud, but are rather signs or indicia from which its existence may be properly inferred as matter of evidence". (Citing cases, among them *Los Angeles Commercial Nat. Bank v. Roberts(a)* 194 P. 751.)

What are some of the "badges of fraud", the concurrence of several of which will make a strong case of fraudulent intent?

Inadequacy of consideration is one, and when the inadequacy is gross and is combined with other circumstances it may amount to proof of actual fraud. *Loring v. Dunning*, 16 Florida 119.

In the case of *Shelton v. Church & Others*, 38 Conn. 416, the Court, at page 420, held:

“It is elementary law that ‘in every instance where a creditor, or purchaser, obtains the estate of an insolvent debtor at under rate, there is a violent presumption of a secret trust and fraudulent intent’ (1 Swift Dig. 275), and such presumption unless rebutted is conclusive.”

In *Barrow v. Bailey*, 5 Fla. 9, it was held that where a vendor, who was largely indebted and embarrassed by the pressure of his creditors sold his entire estate, real and personal, to a friend at a price considerably less than the fair market value of the property and less than the sum of his debts, the conferences between the vendor and vendee being held in secrecy, and no appraisement by or reference to any third person being made on the question of value, *fraud should, in such a case be inferred.*

We have another “badge of fraud” when a transfer is made by one, while a suit or judgment is pending against him, especially so if it leaves the debtor without any estate or greatly reduces his property. See *Griggs v. Crane*, 179 Ky. 48, 200 S.W. 317.

It is a "badge of fraud" that a conveyance was made after the rendition of a verdict in favor of a creditor; and while a stay of proceedings was in force, or after a final judgment has been entered. See *Maasch v. Grauer*, 58 App. Div. 560, 690 N.Y.S. 187.

The conduct of a sale or transfer not in the usual course of business or in an unusual way is a badge of fraud. See *Rossen v. Villanueva*, 175 Cal. 632 at 636, 166 Pac. 1004.

So are secrecy and haste surrounding a transaction badges of fraud. (See Sec. 143 of 27 C. J. for a long list of authorities) and *Daugherty v. Daugherty*, 104 Cal. 221, 37 Pac. 889.

And one of the most compelling badges of fraud is a transfer by a debtor of all or nearly all of his property, especially so when he is rendered insolvent by the transaction. (See *Ballou v. Andrews Banking Co.*, 128 Cal. 562, 61 Pac. 102; *Daugherty v. Daugherty*, 104 Cal. 221, 37 Pac. 889; 27 C. J., Sec. 146; *Dodson v. Cooper*, 50 Kan. 680, 32 Pac. 370.)

All of the foregoing badges of fraud are obvious in the transaction of January 8, 1941 with defendant Peter Bercut. So much so, that when coupled with the violent breach of fiduciary obligation and the improper corporate conduct herein shown and discussed, the conclusion is inescapable that, in addition to the failure of Peter Bercut to pay a fair consideration for the stock, there is also present an actual intent to

hinder, delay and defraud the creditors of Pacific Empire Holdings, Inc.

Such being the case the transaction is void as to these creditors of the corporation and a receiver in equity, as representative and trustee for the creditors, has the right and duty, in their behalf, to seek to recover the transferred property and its subjection to the claims of creditors. (See *Olney v. Tanner*, 18 Fed. 636; 27 C. J., Secs. 125 and 126 on Fraudulent Conveyances; *Guth v. Loft* (supra); *Pepper v. Litton*, supra.)

POINT No. 9.

Judgment in this cause should be rendered in favor of plaintiff as prayed for in plaintiff's complaint.

(a) The findings of fact of the trial Court are reviewable by this Court and should be reversed.

This cause is essentially an equity case, notwithstanding the second and third count of plaintiff's complaint.

Findings in equity may be revised if against the weight of the evidence at the instance of the appellant, but not on behalf of the appellees if the revision of the findings carries with it a revision of the judgment. (*Morley Const. Co. v. Maryland Casualty Co.* (Mo. 1937), 57 Sup. Ct. 325, 300 U. S. 185, 81 L. Ed. 593, reversing (C.C.A.) 84 Fed. (2d) 522.)

Although the Appellate Court ordinarily attaches great weight to findings of a chancellor, *it is not bound by them*, and if, upon review of the evidence, the Appellate Court reaches contrary conclusion, it will, if the findings of the chancellor appear clearly wrong, give it its own conclusions and effect. (*McIntosh v. Leisk* (C.C.A. 5th 1938), 95 Fed. (2d) 164.)

Where findings are asserted to be without supporting evidence or contrary to evidence the Appellate Court is required to examine them, notwithstanding the presumption of correctness that attends concurrent fact findings by master and judge. (*In re Waters* (C.C.A. 5th 1938), 93 Fed. (2d) 196, 114 A.L.R. 1368.)

Plaintiff respectfully submits to the Court that the correct findings of fact and conclusions of law in this cause, reasonably deducible and warranted by the evidence of the case, are as proposed by plaintiff to the trial Court. (R. 904.)

(b) Plaintiff is entitled to judgment as prayed for in his complaint.

On the record and the law and equity of the case, as discussed under our Point No. 8, judgment should be rendered in favor of plaintiff for a restitution by the defendants Peter Bercut and Henri Bercut of all shares of Merchants Ice received by them from defendants M. Maffei and L. R. Arnold pursuant to the letter agreement dated January 8, 1941, and for an

accounting by the defendants for all profits resulting to them from said transaction. (*Loft, Inc. v. Guth* (supra), 2 Atl. (2d) 225; *Blum v. Fleishhacker* (supra), 21 Fed. Supp. 527; *Pepper v. Litton* (supra), 308 U. S. 295; *Angelus Securities Corp. v. Ball* (supra), 20 Cal. App. (2d) 423; *Yamato v. Bank of Southern California*, 170 Cal. 351; *Yokohama Specie Bank v. Transoceanic*, 54 Cal. App. 533; *Los Angeles Drug Co. v. Superior Court*, 8 Cal. (2d) 70, 63 Pac. (2d) 1124.)

The rule of law applicable in this respect is well stated at Section 986 of 13 *Am. Juris. (Corp.)*, at page 940, where, upon numerous cited authorities, it is declared:

“The directors and officers of a corporation may be held liable to it for loss or injury consequent upon their unauthorized acts or contracts. There can be no doubt that if they do acts clearly beyond their power, whereby loss ensues to the corporation, or dispose of its property or pay away its money without authority, they will be required to make good the loss out of their private estates. This is the rule where the disposition made of money or property of the corporation is one either not within the lawful power of the corporation or, if within the power of the corporation, not within the power or authority of the particular officer or officers.”

In proper cases a converter of goods can be held liable as a constructive trustee and not only for the

value, but also for the profits earned. (*Scott on Trusts*, Vol. 3, Sec. 508.1, at page 2434, and cases there cited.)

CONCLUSION.

We sincerely apologize to the Court for the length of our brief. Our justification is to be found in the nature and complexity of the case.

We respectfully ask the Court, after a full consideration of the record and our contentions, to reverse the judgment of the District Court and to direct said Court to enter judgment in favor of plaintiff on such terms and conditions as to this Court may seem meet, proper and just.

Dated, San Francisco, California,
January 5, 1944.

Respectfully submitted,

A. J. SCAMPINI,
ELLIS & STEINDORF,
C. T. HUBNER,
IVAN CULBERTSON,

Attorneys for Appellant.

(Appendix Follows.)

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Appendix.

Appendix

PART I.

BY-LAWS OF HOLDING COMPANY IN FORCE ON JANUARY 8, 1941.

The following sections, among others, of the By-Laws of the Holding Company (R. 74p to 75w) were in force on January 8, 1941; and applicable to the issues involved in this case, viz.:

“ARTICLE IV—DIRECTORS.

Section 1. *Election.* The directors shall not be less than fifteen (15) nor more than twenty-five (25) in number and shall be elected by ballot at the annual meeting of the stockholders.

Section 2. *Term of Office.* Directors shall hold office for one year and until their successors are elected or appointed. Their term of office shall begin immediately after election.

Section 4. *Vacancies.* A vacancy shall be deemed to exist in the board of directors only whenever any director ceases to act as such by reason of his death, removal, or *resignation duly accepted*, etc.

ARTICLE VI—DUTIES OF DIRECTORS.

Section 6. *Management.* The board of directors shall manage and control the business of the corporation.

ARTICLE VII—EXECUTIVE COMMITTEE.

Section 1. *Appointment.* The directors may appoint an executive committee from their own number to consist of such number as they shall see fit.

Section 2. *Powers.* Any executive committee appointed by the board of directors shall have authority to exercise all the powers of the board of directors when said board is not in session, but subject to the immediate disaffirmance by the board at its next meeting after receiving the report of the acts done by said committee. Such committee may act by the written consent of all its members although not formally convened.

Section 3. *Removal.* Members of this committee may be removed as such and their successors may be appointed by the board and said committee may be abolished at any time by the board of directors."

The powers, authority and duties of the president, vice-presidents and secretary are set forth in Articles VIII, IX, X and XI of the By-Laws found at pages 74w to 74z of the record.

PART II.

FINANCIAL REPORT OF HOLDING COMPANY MAILED JUNE
30, 1940 TO THE STOCKHOLDERS. (Pl. Ex. 15, R. 205.)

Pacific Empire Holdings, Incorporated
26 O'Farrell Street
San Francisco

June 30, 1940.

To the Stockholders of
Pacific Empire Holdings, Incorporated:

This is the annual report of the management, covering the operation of your corporation for the year 1939, accompanied by the Consolidated Balance Sheet of the corporation at the close of business, December 31, 1939, as prepared by the Treasurer.

Merchants Ice and Cold Storage Company: The company, during the year 1939 enjoyed its largest volume of business since the year 1937, realizing during that period \$65,381.05 of net profits from operations and before depreciation charges, representing the largest cash net income during many recent years included in its history of operation. Throughout the year, the company's condition became more sound and its net current position improved by approximately \$65,000.00. The improved condition of the corporation was accomplished even though, effective October 31, 1939, the management, after long negotiations, was compelled to grant an increase in the wage scale for the majority of its employees, which will ultimately result in increased labor costs of approximately \$15,000.00 annually. This development, together with the existing high interest rate on its bonded and other indebtedness, greatly re-

duces the net cash profits being earned by the company. Constant progress is being made toward remedying these latter conditions.

As set forth in this and preceding Balance Sheets of your corporation, the investment in the controlling stock of Merchants Ice and Cold Storage Company constitutes your corporation's largest investment. Consequently, all steps which have been taken since the reorganization to date, have been pointed toward placing this investment on a dividend basis. It is the opinion of the management that, after the elapse of another year's operation, the financial condition of Merchants Ice and Cold Storage Company will be such as to permit the company to work out certain financial readjustments affecting its bonded indebtedness and capital structure, whereby the payment of dividends will be made possible consistent with the net income which may be realized. Your corporation should then profit materially.

Frostcraft Packing Corporation: The acquisition of a substantial interest in Frostcraft Packing Corporation was previously included in the Balance Sheet for the year 1938. This acquisition was prompted by the opinion of the management of your corporation that an entry into the production of frosted foods was not only opportune from the standpoint of your corporation, but a constructive step in a field which should prove highly valuable and profitable to Merchants Ice and Cold Storage Company. The development of this corporation, during the year 1939, has reached the point whereby it is looked upon as one of the ten better nationally known companies producing and distributing frosted foods. While the company

has not yet progressed sufficiently since its organization to produce profits, nevertheless, it has already proven itself to be a valuable tenant and customer to Merchants Ice and Cold Storage Company.

Other Holdings and Investments: During the year 1939 there were no changes in your corporation's holdings in the stock of Pacific Empire Corporation, the bank stock holding company, excepting, however, that during the year, Pacific Empire Corporation disposed of 280 shares of its holdings of the capital stock of Pacific National Bank of San Francisco. The proceeds of this sale were utilized for the purpose of making additional loans to Merchants Ice and Cold Storage Company and to reduce the corporation's obligations owing to banks. The corporation continues to carry in its investments substantial holdings in the stock of Pacific National Bank, as reflected by the accompanying Consolidated Balance Sheet.

The investment in the stock of California Pacific Service, Incorporated continues to prove erates principally the Family Service Laundry at Bakersfield, California, enjoyed a gross volume of business for the year 1939 of \$96,502.43. As heretofore reported, the operation of these properties has netted your corporation attractive annual profits consistently, since the acquisition of the stock of that company.

General: During the year under discussion, total liabilities of the corporation have been reduced by \$53,581.82, including the reduction of \$37,563.00 of notes payable to banks. Also during the year, even further economies have been ef-

fectured by the management in general administrative and operating expense, with the result that the total expenditures of the corporation and consolidated subsidiaries, other than interest paid on obligations, equalled \$8633.20. This figure represents a further reduction of overhead costs including all administrative charges and executive salaries of \$4517.95.

The management, during the year, negotiated the cancellation of the lease on the premises occupied by the corporation and the change in the location of their offices, which will result in an annual saving of \$4110.00.

As evidenced by the accompanying Balance Sheet, the management continues to increase its holdings in the stock of Merchants Ice and Cold Storage Company whenever the occasion warrants, thus improving its equity position, accordingly. This policy prevails toward any investment of your corporation, whenever it is possible to increase its majority holdings.

In concluding the report covering the 1939 operation of the corporation, the management wishes to state that the condition of the corporation and its controlled operating companies, has been greatly improved during these recent years, and further, that its foundation is sound to the end that the stockholders should ultimately benefit therefrom.

Respectfully submitted,

BY ORDER OF THE BOARD OF DIRECTORS,
L. R. Arnold,
Executive Vice-President.

M. Maffei,

President."

PACIFIC EMPIRE HOLDINGS
Incorporated

CONSOLIDATED BALANCE SHEET

as of December 31, 1939

After giving effect to adjustments to reflect the estimated fair or liquidating
value of all assets owned by the Company

Assets

Investments:	
Capital Stock of Pacific National Bank.....	\$ 82,176.65 (A)
Preferred Stock of Merchants Ice and Cold Storage Company.....	123,456.66
Common Stock of Merchants Ice and Cold Storage Company.....	545,906.81 (B)
Common Stock of Frosteraft Packing Corporation.....	10,000.00 (C)
Capital Stock of California Pacific Service, Inc.....	86,582.40 (D)
Total Investments	<hr/> \$848,122.52
Cash on Hand and in Banks.....	6,677.89
Notes and Accounts Receivable, Less Reserve.....	33,387.26
Other Stock and Securities.....	10,197.85
Printing Plant; Furniture and Fixtures, Less Reserve for Depreciation.....	236.53
	<hr/>
	<u><u>\$898,622.05</u></u>

Liabilities

Notes Payable, Banks	\$ 46,000.00 (E)
Other Notes Payable	14,880.00 (E)
Notes and Contracts Payable, Long Term Installment.....	56,858.20 (E)
Accounts Payable	14,145.45 (E)
Reserve for Contingencies	15,000.00 (F)
Reserve for State Franchise and Federal Income Taxes.....	410.59
Minority Stockholders Interest in Capital Stock of Subsidiary Corporations..	123,335.33
Capital Stock and Surplus:	
Capital Stock Authorized	5,000,000 Shares
Capital Stock Issued	2,560,996 Shares
Less: Treasury Stock	24,535 Shares
Outstanding	249,834.73
Surplus, Capital (Consolidated)	378,157.75
	<hr/>
	\$898,622.05
	<hr/>

No. 10,550

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS H. WINGATE, as Receiver in Equity
for Pacific Empire Holdings, Incorporated
(a corporation of the State of Delaware),

Appellant,

VS.

PETER BERCU, HENRI BERCU, M. MAFFEI and
L. R. ARNOLD,

Appellees.

BRIEF FOR APPELLEES PETER BERCU AND HENRI BERCU.

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Alexander Building, San Francisco, California,

LOUIS H. BROWNSTONE,

Russ Building, San Francisco, California,

Attorneys for Appellees

Peter Bercu and Henri Bercu.

FILED

FEB - 7 1944

PAUL P. O'BRIEN,
CLERK



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No. 10,550

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS H. WINGATE, as Receiver in Equity
for Pacific Empire Holdings, Incorporated
(a corporation of the State of Delaware),

Appellant,

vs.

PETER BER CUT, HENRI BER CUT, M. MAFFEI and
L. R. ARNOLD,

Appellees.

BRIEF FOR APPELLEES PETER BER CUT AND HENRI BER CUT.

May it please the Court:

The brief for appellant violates your Rule 20(d), fourth sentence, which plainly requires that "In equity * * * cases, and at law when findings are made, the specifications state *as particularly as may be* wherein the findings of fact and conclusions of law are alleged to be erroneous"; at least there are violations in what he calls, at his pages 60 and 61, Points 4, 5, 6 and 9. (See *Berry v. Earling*, 9 Cir., 82 F. 2d 317.)

Also, he misconceives the nature and scope of the appellate review open to the Court: At his page 120, "Point No. 9(a)", he seems to labor under the view that only

the findings under the equity count are open for review. The case was tried without a jury, which opens the whole case under Rules of Civil Procedure, Rule 52(a), giving his appeal a broader scope than he apparently thought it had. On the other hand, although what he asks of the Court is a weighing of the evidence, his statement of the facts is incomplete, one-sided, highly colored, inaccurate, and at best no more than a selection merely of those portions of the evidence deemed by him most favorable to himself, in disregard of credibility, conflicts in testimony, and all else. The appellant simply ignores controlling rules of review: Rule 52(a), third sentence, reads:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

The first citation in the advisory committee's notes thereunder is *Silver King Coalition Mines Co. v. Silver King Consolidated Mining Co.*, 8 Cir., 204 Fed. 166, wherein at page 177 it was said:

“Each of the findings of fact from which the court deduced this conclusion is vigorously assailed by each of the parties to this suit in oral argument and in briefs which contain many hundreds of printed pages. Each of them has been carefully examined, with the aid of these arguments and briefs, and in the light of the evidence to which they refer, and has been found to have been deduced from conflicting testimony, and many of them from evidence very evenly balanced. These findings, therefore, fall far within the familiar rule that, where a court has considered conflicting evidence, and made a finding or decree, it is presumptively correct, and unless some obvious

error of law has intervened, or some serious mistake of fact has been made, the finding or decree must be permitted to stand. *Coder v. Arts*, 152 Fed. 943, 946, 15 L.R.A. (N.S.) 372; *Tilghman v. Proctor*, 125 U.S. 136, 31 L. Ed. 664; *Kimberly v. Arms*, 129 U.S. 512, 32 L. Ed. 764; *Furrer v. Ferris*, 145 U.S. 132, 134, 36 L. Ed. 649."

Prior to Rule 52(a), this Court repeatedly restated the rules with respect to oral testimony and conflicts of testimony, e.g.: *Exchange National Bank of Spokane v. Meikle*, 61 F. 2d 176, 178-9; *National Reserve Ins. Co. v. Scudder*, 71 F. 2d 884, 887-888; *Neukom v. North Butte Mining Co.*, 84 F. 2d 101. And it has restated them since Rule 52(a):

"The findings of the trial Court fall within the familiar rule, that where based upon conflicting evidence they are presumptively correct, and unless some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand. *Silver King Coalition Mines Co. v. Silver King C. M. Co.*, 8 Cir., 204 F. 166, 177, Ann. Cas. 1918B, 571.

The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52(a), 28 U.S. C.A. following section 723c), is but the formulation of a rule long recognized and applied by courts of equity. *Guilford Const. Co. v. Biggs*, 4 Cir., 102 F. 2d 46, 47.

As was said by Mr. Justice Holmes in *Adamson v. Gilliland*, 242 U.S. 350, 353, 61 L. Ed. 356 (citing *Davis v. Schwartz*, 155 U.S. 631, 636, 39 L. Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of wit-

nesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable'."

Wittmayer v. U. S., 118 F. 2d 808, 811;

Guilford Const. Co. v. Biggs, 102 F. 2d 46, 47;

Cherry-Burrell Co. v. Thatcher, 107 F. 2d 65, 69;

Weber v. Alabama-California Gold Mines Co., 121 F. 2d 663, 664 (no conflict; question of credibility);

Stimson v. Tarrant, 132 F. 2d 363, 365.

I.

STATEMENT OF THE CASE.

The whole of the brief for the appellant, from the beginning to the end of it, and under whatever heading or subheading his argument proceeds, is based upon a false major premise, i.e., a false assumption that what we bought at the fair price of \$35,000 was at the time worth \$300,000. Remove that false premise of a value greater than \$35,000 and the foundation of appellant's brief is gone.

Certainly, if we did buy at \$35,000 something that at the time was worth \$300,000, such a gross inadequacy of price would have shocked the conscience of the judge who presided over the trial in the Court below, and would invalidate the transaction in any Court, trial or appellate, on any theory. No Court would have any difficulty in finding some theory of invalidation, whether Bercut was at the time of the transaction a director or not, although the fact is that he was not.

Another false major premise of the appellant is the false assumption that Bercut was one of the managers of the corporation, when in fact Arnold and Maffei were the sole managers of it.

Rule 20(3) of this Court contemplates from an appellee no "Statement of the case" excepting as to points of controversy with the statement by an appellant, and we therefore turn to the principal matters in which the statement presented by the appellant is controverted by us:

- (a) Prior to the transaction of January, 1941, Peter Bercut had never been the manager of either Pacific Empire Holdings, Inc., Pacific Empire Corporation, or Merchants Ice and Cold Storage Co.

At his pages 14 and 15 appellant states: "all these companies, then under the active management and supervision of the defendants Maffei, Arnold and Peter Bercut"; "the defendants Maffei, Arnold and Peter Bercut, ran, managed and supervised all of these companies". Appellant cites no supporting page of the record. There is no support. The statement is true as to Maffei and Arnold; it is untrue as to Peter Bercut. Bercut was not a manager. The trial Court found, Finding III, at R. 944:

"Said M. Maffei and L. R. Arnold were, and each of them was, familiar with all matters and things appertaining to the condition and affairs of the corporation and with the knowledge and consent of its Directors actively managed, controlled, carried on and conducted its business and affairs. During all of said time, defendant, Peter Bercut, took no active part in the management or direction of the affairs of said corporation or the preparation of any finan-

cial statements in connection therewith or appertaining thereto."

In none of the "Points" of appellant's brief, under "Part VII, The Argument", do we find any attack upon the evidentiary support of the quoted finding. The finding comes to this Court as an established fact. Appellant simply ignores the finding and assumes the contrary. The finding is supported by uncontradicted evidence. Maffei testified:

"Q. [by Mr. Scampini] Who actually managed the affairs and business of the Pacific Empire Holdings, Inc.?

A. Myself and Mr. Arnold, both." [R. 73.]

"Q. [by Mr. Scampini] Who was really operating and managing this set-up?

Mr. Naus. What do you mean by 'this set-up'?

Mr. Scampini. Pacific Empire Holdings and Pacific Empire Corporation.

A. Both I and Arnold." [R. 186.]

"Q. [by Mr. Naus] Now, down there at 26 O'Farrell street, you had your offices, as I understand it.

A. Correct.

Q. And all of these corporations occupied these offices for the same purpose?

A. Correct.

Q. There was Pacific Empire Holdings?

A. Right.

Q. And formerly the Calitalo was there?

A. Yes.

Q. And the Pacific Empire Corporation?

A. Correct.

Q. And the Merchants Ice & Cold Storage Company?

A. Yes.

Q. And the laundry company, what was its name?

A. Laundry Service.

Q. And there were some others from time to time?

A. Yes.

Q. All being run by the same two executives, Arnold and Maffei?

A. Yes.

Q. With the same bookkeeper, Heer?

A. Yes.

Q. Now, in handling the affairs of these various corporations through that staff, did you handle the affairs of any one of these corporations in any different routine manner than you handled the affairs of any other?

A. Mr. Arnold handled pretty nearly all of the financial affairs of the corporations, of all of the corporations." [R. 287.]

"Q. [by Mr. Naus] In other words, from the time Vincent, Stratton and McInerney went out of the management you and Mr. Arnold have been in the saddle there ever since until the receiver came in, running these corporations to suit yourselves, haven't you?

A. Well, we tried to run them to the best of our ability.

Q. I know to the best of your ability, but you and Arnold decided just what was to be done and did it, isn't that correct?

A. Yes.

Q. That was during all of the time after Vincent and Stratton went out and left you in there?

A. Yes.

Q. That ran over a period, let us say, of ten years before the sale to Bercut?

A. About nine or ten years." [R. 292.]

“Q. [by Mr. Naus] Now, Mr. Maffei, as a matter of fact, in the handling of these various corporations—the Pacific Empire Holdings, Inc., Pacific Empire Corporation, Merchants Ice & Cold Storage Company, and the laundry company, and so on,—you and Mr. Arnold took the cash that any of these corporations had on hand at any time and used it as you pleased for the use of any of the other corporations, didn’t you?

A. That is right.

Q. In so far as yourself and Mr. Arnold were concerned, these corporations had four different pockets, and you took it out of one pocket of the four and put it into any one pocket that you wanted?

A. We used one corporation as the holding company.” [R. 295.]

Mr. Arnold, called by the plaintiff as a witness, testified:

“Q. [by Mr. Goodman, on cross-examination] The Pacific Empire Holdings Company was, as its name implies, a holding company?

A. That is correct.

Q. You didn’t have to conduct any business in the Pacific Empire Holdings Company except to watch out for these important investments that the Pacific Empire Holdings Company had?

A. Well, it wasn’t an operating company, if that is what you mean.

Q. And the sole business of that company was to safeguard and watch out for and take care of the investments that the company had? Isn’t that right?

A. Yes, supervise its operating companies.

Q. And were you the man who was in the nature of manager of the affairs during that period of time?

A. Well, I do want to say this right there, that I more or less managed the affairs. It was all under

the complete—under the supervision of Mr. Maffei; I mean everything that was done, he knew about.” [R. 763-765.]

“Q. [by Mr. Goodman] And it is a fact, is it not, that you did, subject to consultation with Mr. Maffei, actually conduct what business affairs there were of the Pacific Empire Holdings?

A. I didn’t conduct all of those things, no. In the Holdings Company Mr. Maffei and I—there were certain things that he was qualified to do and did, and certain things that I was more qualified to handle, and I would handle them.

Q. What were the things that Mr. Maffei was qualified to do, the best of your recollection?

A. Well, in things directly affecting the holding company.

Q. What, for example?

A. Well, for instance, our backing, through the Pacific Empire Corporation—he was active with the bank as our representative; he spent a lot of time around the Merchants there before I was president and while I was.” [R. 766.]

- (b) The District Court was not bound to accept as true the “minutes” of Pacific Empire Holdings, Inc., or Pacific Empire Corporation.

The “minutes” of the two “Pacific” companies¹ are substantially worthless. Arnold² “dictated the minutes to the secretary and she would write them up”, R. 273. This Court need only read the fencing and occasionally evasive answers of Maffei on cross-examination, over the twenty pages, R. 270 to 290, to see that meetings were never

¹The board meetings of Merchants Ice and Cold Storage Company were *actually* held, R. 288-289, thereby differing from the “Pacific” companies.

²Maffei was not the author of any of the minutes, R. 273.

actually held, and that the "minute books" of the "Pacific" companies are little, if anything, more than paper memorials of Arnold's occasional excursions into fantasy, mere window-dressing of the management by him and Maffei. The appearance and demeanor of Maffei during the cross-examination recorded in those pages were such as to cause the trial judge to indicate that Maffei was simply wasting the time of the Court in his verbal feintings and evasions, R. 283-284. Mr. Scampini (one of the attorneys for appellant) had been attorney for the corporations until September, 1936, when he resigned "because they had no meetings", R. 284-285. His letter^{2a}

^{2a}The letter is on the letterhead of Hettman & Scampini, Counselors at Law, Bank of America Building, 485 California Street, is dated August 17, 1936, and is addressed to Pacific Empire Corporation, 26 O'Farrell Street, San Francisco, California. It reads:

"Gentlemen:

You may consider this as my resignation as a Director and counsel for Pacific Empire Corporation.

I have been constrained to make this decision, because of the fundamental differences of opinion prevailing between me and the management concerning the policies and conduct of the company's business, which leads me to the conclusion that for the best interests of the company I should disassociate myself with it to the end that any responsibility attaching to and arising out of the management of the business of the company shall rest on the proper persons. I must observe, however, that **since the formation of this company not a single directors' meeting has ever been held**, and all decisions made by the management involving the company's properties have been made solely on the responsibility of its officers, without any ratification whatever on the part of its Board of Directors.

I, therefore, must disclaim any responsibility whatever for any matter or thing done by the management in the premises.

My office has been acting as counsel for the company since its organization, and in view of the fact that no settlement has ever been made with me looking towards the fixing of any compensation for my services so far, I suggest that you designate one of your officers to meet with me in an effort to arrive at an amicable settlement in that connection.

Yours very truly
(Signed) A. J. Scampini"

of resignation purported to have been accepted at a "meeting of September 25, 1936", but even *that* meeting never occurred in fact:

"Q. [by Mr. Naus] Did you actually accept Mr. Scampini's resignation at a meeting that was actually held?

A. No.

Q. In other words, the minutes purporting to accept his resignation are minutes of a meeting that never occurred, is that right?

A. That is right." [R. 284.]

And the practice did not stop there. No meetings were held after he resigned:

"Q. [by Mr. Naus] Well, from the time he resigned, onward from there, in the future, did you actually hold meetings?

A. After he resigned?

Q. Yes.

A. We had no meeting." [R. 286.]

(c) **Arnold and Maffei**, although aligned with us in the pleadings, are in reality aligned with the plaintiff.

Maffei and Arnold knew perfectly well that they had made an arm's-length transaction with the Bercuts in January, 1941, and for the greater part of two years it never occurred to them that the transaction was open to attack. "I never had that in my mind at any time," said Maffei, R. 314; Arnold, R. 816-823. "Out of a clear sky," R. 823, eighteen months after the Bercut transaction, Maffei and Arnold received this letter of July 16, 1942, from Mr. Thomas H. Wingate, attorney, Wilmington, Delaware, R. 424, 823:

"July 16, 1942

Pacific Empire Holdings, Inc.

26 O'Farrell Street

San Francisco, California

Dear Sirs:

I have been retained by a group of stockholders of Pacific Empire Holdings, Inc. who have requested that I file a Bill of Complaint against the corporation, seeking the appointment of a receiver on the ground of mismanagement and for the purpose of having a receiver to bring stockholders' derivative action against the individual directors for mismanagement and waste of the corporate assets. The stockholders also request that I file a petition for a Writ of Mandamus to secure a full and complete examination of the corporation's books and records.

I am reluctant to resort to these extraordinary remedies without giving the management an opportunity to state their position. If you care to discuss these proceedings with me, I shall be glad to do so. In the event I do not hear from you on or before July 29th, I shall understand that you do not wish to discuss the matter, and I will proceed to file the proceedings.

Very truly yours,

Thomas H. Wingate''

Maffei and Arnold at once went to Mr. Scampini for advice, R. 816-823, and in the latter's office, R. 818, there was originated among the three an arrangement under which Mr. Wingate's threatened attack upon the management (Maffei and Arnold) was deflected to Bercut, resulting in Maffei and Arnold as nominal defendants being called by Mr. Scampini as the principal witnesses for the plaintiff. This is how it was done: On July 27,

1942, the eleventh day after the date of Mr. Wingate's letter, Mr. Scampini telegraphed to Mr. Ivan Culbertson, another Wilmington, Delaware, attorney, to "see if you can talk Mr. Wingate into deferring any action until I have looked into this matter and reported to you", R. 425. Mr. Culbertson replied by telegram of July 30, 1942, that he had done so, R. 426. On August 2, 1942, Mr. Scampini outlined his scheme in a long letter to Mr. Culbertson, R. 426-433. Of Maffei and Arnold, he said *inter alia*, R. 426-427:

"Since my wire to you of July 29 and your reply of July 30, with respect to the above subject matter [Re: Pacific Empire Holdings, Inc.] I have been engaged almost continuously in conferences with the officers of the corporation, all of whom are fine men but who, unfortunately, have an impossible task."

Therein, he further stated, R. 429:

"The present management is not in a position, practically speaking, to rescind the transaction entered into with Peter Bercut, for the reason that the present management was a party to the transaction."

He suggested a receivership, but cautioned, R. 430:

"Any receiver of this corporation so appointed should be what we lawyers understand as a 'friendly receiver'."

He then stated that he was a creditor on an unpaid note for \$500, and an owner of 3263 shares of stock, R. 430, and then stated his plan, R. 431:

"I suggest the following procedure. I will assign the promissory note to your secretary, Rebecca Tan-

zer, and transfer the stock to some other person designated by you. Let these two persons, one as a creditor and the other as a stockholder, file a complaint, alleging insolvency or imminent threat of insolvency," etc.

He added, R. 431:

"I can prepare the form of complaint for you, knowing as I do the history of the organization. I would then file the complaint and serve it upon Corporation Trust Company, its resident agent. The Board of Directors here would call a special meeting and adopt a resolution consenting to the appointment of a receiver. The receiver then could designate an agent to represent him here in California, in accordance with Section 4407 of your Revised Code of 1935. I, as such agent, or anybody else appointed as such agent, could take possession of the local offices and represent the receiver in California. Under our decisions a receiver appointed by the courts of a sister state need not be appointed ancillary receiver in order to be entitled to prosecute actions in the courts as such receiver."

After casually mentioning that he thought his scheme should result in enabling the corporation to "pay a good fee to the receiver and its attorneys, etc, etc.", R. 432, he concluded, R. 433:

"What I want to know from you is can you handle it along the foregoing suggested lines? Do you know Wingate well enough, or anybody else, to arrange with with him to represent the plaintiffs in filing the complaint while you appear as attorney for the corporation in consenting to the appointment of a receiver, and do you think that you can have the Chancellor appoint the proper receiver?"

August 6, 1942, Mr. Culbertson telegraphed this reply, R. 433-434:

"I have studied carefully your letter of August 2. Your plan feasible and can work out on suggested lines. You should move rapidly as Wingate insisting on going ahead with his complaint. Suggest Wingate for receiver. He will cooperate. Essential you send five hundred dollars to assure carrying out of plan and payment of costs and expenses. Assign your note at once to Tanzer and your stock to Elizabeth Wilhelm.³ Suggest you send complaint at once as I cannot hold situation here indefinitely. Regards."

As part of the plan, R. 431, a "meeting"⁴ of the board on August 20, 1942, adopted minutes prepared in advance by Mr. Scampini, R. 775, a "certified copy of minutes" was transmitted by Mr. Scampini's letter of August 22, 1942, to Delaware, and the consent receiver, Mr. Wingate, was appointed on August 31, 1942, R. 20-30. The present complaint against Mr. Bercut was filed on October 20, 1942, R. 27.

Rebecca Tanzer and Elizabeth Wilhelm were strangers to Arnold and Maffei, R. 822.⁵ If there be any conspiracy

³That is the way it was done: R. 20, "In the Court of Chancery of the State of Delaware, in and for New Castle County, Rebecca Tanzer and Elizabeth Wilhelm, Complainants, v. Pacific Empire Holdings, Incorporated, a corporation of the State of Delaware, Defendant. Bill for Receiver."

The bill of complaint and an answer admitting its allegations, were filed August 31, 1942, and a consent receiver appointed forthwith on that day, R. 20-23.

⁴Mr. Webb Richards, one of the directors, testified that no meeting actually occurred, R. 641.

⁵*U. S. v. Manton*, 2 Cir., 107 F. 2d 834, 848, col. 1:

"It is not required that each of the conspirators shall participate in, or have knowledge of, all its operations. He may join at any point in its progress and be held responsible

reflected by the record at bar, it is not the one that the "fine men" (R. 426-427, Scampini letter of August 2, 1942) Maffei and Arnold concerted with the "receivership" group in alleging, R. 11, between Arnold, Maffei and Peter Bercut, because the trial Court found, Finding VII, at R. 949, that such a conspiracy never existed. The only "conspiracy" shown by the record is the one between Maffei, Arnold, and the Delaware receivership group.

(d) The value of the shares of Merchants Ice and Cold Storage Company sold to Bercut did not exceed \$35,000.00.

Finding VII, at R. 948, is simple and perfectly clear:

"The price paid for said shares, to-wit, the sum of \$35,000.00, was a fair, reasonable and proper price for said shares. * * * the shares * * * were reasonably worth a sum not in excess of \$35,000.00."

The brief of appellant is strangely lacking in the candor due the Court in an attack upon a finding; he wholly suppresses the testimony of some witnesses which clearly supports the finding. This is how the appellant's brief goes at it: at his page 5 he points out that his complaint "alleged"⁶ a value of "not less than \$1,000,000.00"; at his next page, page 6, he states cost "was about \$400,000.00"; he then states, page 32, a book value of

for all that may be or has been done. *Allen v. United States*, 7 Cir., 4 F. 2d 688, 692; *Baker v. United States*, 4 Cir., 21 F. 2d 903, 905; *Rudner v. United States*, 6 Cir., 281 F. 516, 519; *Commonwealth v. Anderson*, 64 Pa. Super. 427."

⁶As seen, *supra*, the complaint grew out of the Delaware correspondence, among which is Mr. Scampini's letter of August 2, 1942, R. 426, which mentions a value of \$250,000, R. 429. By the time the complaint was drawn the amount was generously watered into an allegation of \$1,000,000.00!

\$669,363.47;⁷ he then quotes at his page 36 testimony of his value witness, Morrish,⁸ that the stock was "worth about \$200,000.00 to \$250,000.00, somewhere around there".

Mr. Morrish testified from a valuation memorandum that he had prepared (printed at R. 471, Defendants' Exhibit E), from which he had reached a conclusion that the preferred stock was worth \$10.00 a share, and the common stock \$2.80 a share. "I considered", he said at R. 460, "the preferred stock was probably worth its par value of \$10.00 a share"; and that, he said at R. 461, "left around \$2.80 a share value for the common". On cross-examination he stated his valuation method of the common stock as follows, R. 477:

"Q. [By Mr. Naus] Then according to your answers to Mr. Scampini as to the value of the common stock per share, you reached that figure—what was it?

The Court. \$2.80.

Mr. Naus. Q. \$2.80. Do you have that in mind?

A. Yes.

Q. You reached that by a method of calculation of what you deemed to be the liquidating value of the assets minus liabilities and then divided that by a certain number of shares?

A. That is correct.

Q. Is that the method?

A. That is right.

Q. Is that the way you get this?

A. Yes."

⁷12,495 shares of preferred, \$123,456.66; 65,863 shares of common, \$545,906.81. Appellant's Brief, p. 32.

⁸Morrish was fired, along with Maffei and Arnold, from the payroll of Merchants Ice, by Bercut, immediately upon the management of Merchants Ice being taken over by the latter. R. 349, 351. Arnold had been drawing \$500 or \$600 a month, R. 227; Morrish, \$200, R. 454.

He reached the value of \$2.80 a share for the common stock by the following calculation, R. 471-472:

"My valuation assets	\$1,576,059.97
All liabilities	859,826.96
	<hr/>
Net value	\$ 716,233.01
Preferred Stock at book ⁹	416,150.00
	<hr/>
Balance for Com. Stock.....	\$ 300,083.01
Common Stock outstanding:	
107,118 shares. Taking my value of assets,	
300,083÷107,118 or \$2.80 per share."	

Using round figures he reached the following conclusion in his valuation report, R. 472:

"Value of Pac. Empire Holding sold to Bercut:	
12,000 shares Preferred at \$10.....	\$120,000
65,000 shares Common at \$2.80.....	184,000
	<hr/>
Total value.....	\$304,000"

Until he was cross-examined he had overlooked the fact that the preferred stock, par \$10.00, was a 7% cumulative preferred, on which no dividend had been declared since 1927, so that at the time of the sale to Bercut in 1941 there were fourteen years of cumulated arrears, or \$9.80 a share arrears, i.e., a total of \$19.80 (\$10.00 plus \$9.80) ahead of the common, R. 478-479. He thereafter admitted:

"Q. [By Mr. Naus] Either as a going concern or as a liquidating concern the articles of incorporation that we have in evidence show that the preferred has the priority on liquidation, so it has a preference either way, can't you see, Mr. Morrish? So that instead of assigning \$10 a share to the preferred you

⁹He corrected "book" to read "par", R. 460.

must assign \$19.80 to the preferred as of the time of the deal in figuring out the liquidating value of the common stock.

A. That is right." [R. 479.]

"Q. [By Mr. Naus] But now, as I have pointed out to you, on your direct examination you have only assigned \$10 a share to the preferred, and since I have provided you with additional information as to which there is no dispute between me and counsel, you must assign \$19.80 to preferred instead of \$10; that using your method, but correcting the figure as to preferred, that that means on the liquidating value the common stock was worthless; isn't that the fact?

A. I have not figured that out.

Q. Would you do so, please, or can't we do it this way, by a question. Let me reframe it. Using your method of \$10 a share you finally end up with some figure of some \$200,000-odd and you divide 107,000 shares of common into that, don't you?

A. Well, if you value the preferred at \$20 a share there would be nothing left for the common stock; that is right." [R. 481.]

He accordingly shifted his valuation into the preferred stock, R. 480:

"Q. [By Mr. Naus] Then can't you see, Mr. Morrish, instead of the common stock having a liquidating value of \$2.80 at the time of this sale, it was worthless at the time of the sale?

A. The value was still there in the preferred stock owned by the Pacific Empire."

In the last analysis the valuation testimony of Mr. Morrish must be tested through his valuation of the assets of Merchants Ice at a total of \$1,576,059.97, which he broke down as follows, R. 471:

"Land	\$700,000.00
Building [and machinery and equipment]	750,000.00
Real Est.	20,000.00
Cash	6,415.57
Accts. Rec.	92,144.40
Bottles	7,500.00"

The trial judge was perfectly justified in considering the item "Land, \$700,000.00", as a gross overvaluation. We called as a witness Mr. Louis T. Samuels, well qualified,¹⁰ on the value of the lands in question, and the buildings thereon. They consist of eight parcels described in detail at R. 645-651, and listed in detail in Defendants' Exhibit M, at R. 657-660. We summarize the land value testified to by Mr. Samuels, R. 657-658:

<u>Parcel</u>	<u>Land Value</u>
1	\$ 19,850
2	18,900
3	18,750
4	14,500
5	4,500
6	4,750
7	2,000
8	75,625
Total	<u>\$158,875</u>

The total square footage of the whole is 154,000 square feet, or an approximate value of \$1.00 a square foot, R. 654. That valuation was corroborated by proof of ten separate and comparative sales of similar lands at arm's length in the open market between willing and uncompelled buyers and sellers at or near the time in question, R. 660-662, including the following substantial buyers and

¹⁰His clear qualifications appear at R. 643-644.

sellers buying and selling on an approximate basis of \$1.00 a square foot:

Hastings Estate
 John Rosenfeld Sons
 Beronio Estate
 United States Government
 Hibernia Bank
 George Brown
 Southern Pacific Company
 Gus Lachman
 McCreery Estate
 Housing Board
 Bank of America

It follows that Mr. Morrish's valuation of the land at \$700,000.00 is an overvaluation to the extent of \$541,125.00 (\$700,000.00 minus true value of \$158,575.00).

Mr. Morrish made a further error of \$54,014.44, in using the balance sheet of December 31, 1939, as his basis, which was a whole year earlier than our transaction in January, 1941. There was an operating loss of \$54,014.44 in the year 1940, R. 610. In the ten years¹¹ 1931-1940 Merchants Ice had aggregate operating losses of over half a million dollars, R. 610, as follows:

<u>Year</u>	<u>Loss</u>
1931	\$ 47,517.09
1932	146,600.46
1933	90,413.95
1934	36,791.86
1935	38,575.89
1936	75,114.59
1937	8,424.03
1938	128,285.18
1939	17,762.76
1940	54,014.44

¹¹This was the period of the Maffei-Arnold management, R. 293.

Mr. Morrish forgot to consider the last year, 1940, in "figuring" value of January, 1941.

Mr. Morrish included in his valuation, "Accounts Receivable, \$92,144.40", as carried on the books. After Bercut took over the management in February, 1941, the following accounts receivable were found to be worthless, R. 606-607:

<u>Debtor</u>	<u>Amount</u>
Frosteraft Corporation	\$11,056.44
W. A. Sherman	9,595.15
Pacific Empire Holdings	35,949.29
San Francisco Fruit Co.	1,617.26
	<hr/>
	\$58,218.14

Mr. Morrish also made an omission of a loss of \$22,000.00 paid to Bank of America as a holder of negotiable warehouse receipts covering non-existing butter. The loss occurred before the sale to Bercut and had to be paid after he took over the management, R. 303, 495, 608.

The foregoing demonstrated errors in Mr. Morrish's valuation calculations aggregate as follows:

Overvaluation of land	\$541,125.00
Operating loss during 1940	54,014.44
Worthless receivables	58,218.14
Butter loss	22,000.00
	<hr/>
Total	\$675,357.58

Mr. Morrish used a "net value" of \$716,233.01 which is accordingly erroneous to the extent of \$675,357.58. Subtracting the latter figure from the former, the result is a corrected net value of only \$40,875.43. Since there were 41,615 shares of preferred stock outstanding there was but \$1.00 a share, approximately, allocated to the preferred

shares, with no intrinsic value in the common stock. We received 12,186 shares of preferred stock, or a value of \$12,186 under the Morrish method of valuation. We paid \$35,000.00, plus \$3850.00¹² additional.

There is still further evidence which the brief for appellant suppresses or withholds. Merchants Ice bonds and stocks were unlisted, and trades were over-the-counter. We called as witnesses F. C. White, Pacific Coast Manager of National Quotation Bureau, R. 580-588, and L. J. Spuller, Jr. manager of trading department of Elsworthy & Company, dealers in unlisted securities on the San Francisco market, R. 589-592. We tabulate their twelve pages of testimony:

BONDS (par \$100)

Jan.	26, 1940	\$65	bid	70	asked
Feb.	2			81	sold
	23			80½	asked
July	28	78	bid		
Aug.	6			82	asked
	12			86	asked
	29	76	bid	79	asked
	30	79	bid		
Oct.	23			71	sold
	30			75	asked
Nov.	28	70	bid		
Dec.	21	60½	bid		
	24	65	bid	70	asked
	26	65	bid	70	asked
	27	68½	bid		
	28	65	bid	70	asked

¹²The Bercuts were to have received 65,863 shares of common and 12,495 shares of preferred. They actually received 62,341 common and 12,186 preferred, R. 603. In order to receive what they actually received, they had to pay out \$3,950.00 to get a large block of preferred released from a pledge, R. 603-605. Pacific Empire Holdings repaid \$100.00, "leaving the Bercuts still out \$3,850 over and above the \$35,000", R. 606.

PREFERRED STOCK

		<u>Bid</u>	<u>Asked</u>
Nov.	15, 1939	\$1.25	sold
Dec.	1, 1939	1.00	
Jan.	2, 1940	1.15	
	6	1.25	
Feb.	5	1.125	
	6	1.25	
Apr.	2	1.25	
Nov.	1	1.00	\$2.00
Dec.	2	1.50	
	6	1.25	
Jan.	4, 1941	1.50	
	8	1.00	
Feb.	10	1.50	
Mar.	3	1.50	2.50
Apr.	5	1.50	
	7	1.50	
Jan.	28, 1942	2.00	
Mar.	21	2.00	
Apr.	2	2.00	
	4	2.00	
	7	2.50	

COMMON STOCK

		<u>Bid</u>	<u>Asked</u>	<u>Sale</u>
Nov.	15, 1939			.12½
Mar.	14, 1940			.15
	16	.10		
Nov.	1	.10	.10¾	
Apr.	1, 1941	.50 ¹³		
	3	.40		
Jan.	6, 1942	.50		

¹³This was three months after the Bercut transaction of January 8, 1941, and two months after Bercut took over the management on February 1, 1941.

		<u>Bid</u>	<u>Asked</u>	<u>Sale</u>
Feb.	5	.25		
Mar.	2	.50		
Apr.	2	.50		
	7	.50		

Cost. Recurring to the statement at page 6 of the brief for appellant that the cost of the Merchants Ice stock to Pacific Empire Holding "was about \$400,000", the references are to Maffei, R. 71,¹⁴ and Arnold, R. 865,¹⁵ where their direct testimony was most vague and general about it. The main acquisition was about ten years before the Bercut deal, at which time in the past Maffei and Arnold obtained the large holding that gave them control, at a price that Maffei stated on direct examination was "Well, about \$250,000.00." In the first place, Merchants Ice suffered operating losses aggregating \$540,000 in the ten-year period between the acquisition of the stock and the sale of it to Bercut. In the second place, Maffei's figure of \$250,000 is reached through jugglery: on cross-examination about it, it developed that some stock promoters, Vincent and Stratton, R. 291, had ten years before somehow obtained control, and were joined by a lawyer and one Sherman, manager of Merchants Ice, R. 291, and the four got together and "sold" the big block of Merchants Ice stock to Pacific Empire Holdings, and turned management of Merchants Ice over to Maffei and Arnold, R. 291-292. Only \$10,000 in cash was used to make that deal, R. 311. The acquisition from Vincent-Stratton was

¹⁴"Well right around 1930 or 1931 they had a few shares, but the big interest was when they took over the McInerney stock and the Sherman stock, and Vincent and Stratton", at a price of "well, about \$250,000".

¹⁵"I think if we added everything up, it probably would cost" half a million.

not for cash, but was on a paper basis under which "an open account in the books" against them was wiped out in an amount "about \$85,000, between \$80,000 and \$90,000", R. 309. Maffei testified, R. 308-309:

"Q. [by Mr. Naus] Now, as a matter of fact, you did not really pay them \$250,000 for it, did you, or do you know what you paid them?

A. Well, the way to find out is from the books.

Q. You did not refer to the books when you gave the figure of \$250,000. I am going to get where you took that figure from. Where did you get that figure of \$250,000 in your mind; how did you make it up?

A. I know more or less how much the big blocks cost.

Q. What are you referring to as the big blocks?

A. The Vincent-Stratton block was around \$90,000, and the McInerney stock was around \$80,000—\$75,000 or \$80,000, something like that.

Q. All right, take the Vincent-Stratton block. You say that block cost about what?

A. About \$85,000, between \$80,000 and \$90,000.

Q. Between \$80,000 and \$90,000?

A. Yes.

Q. Do you recall that you immediately recorded in the books of the Pacific Empire Holdings that as an asset in the amount of \$250,000, that one block?

A. Well, that was according to the statement of the Merchants Ice & Cold Storage Company, I suppose, not the cost.

Q. I don't know how you arrived at the figure; I am asking you about the fact. You recall that this block of stock that you say you bought from Vincent and Stratton for around \$80,000, that you recorded this in the books of the Pacific Empire Holdings as an asset of the value of \$250,000; do you recall that?

A. Well, I suppose that was put on the books as the value of the stock."

The ultimate carrying of the "investment" in Merchants Ice stock on the books of Pacific Empire Holdings at around \$700,000 grew out of "write-ups". Maffei testified, R. 308:

"Q. [by Mr. Naus] It was a write-up, was it not?

A. It would be."

One of the witnesses called by plaintiff was Walter O. H. Plagemann, who had been in the employ of Merchants Ice for twenty-five years, R. 510. He testified, R. 513:

"Q. [by Mr. Scampini] As a matter of fact, Mr. Plagemann, under the regime of Stratton and Vincent and Mr. Sherman and Mr. Arnold there was some very poor management, was there not, in your opinion?

A. Yes.

Q. There were a lot of shenanigans in the company, were there not?

A. They thought money was growing on trees."

At the end of 1940 Pacific Empire Holdings was indebted to Merchants Ice for an aggregate of \$46,999.29 cash withdrawn from the latter from time to time, R. 519. Plagemann testified:

"Q. [by Mr. Scampini] Was it ever actually paid off, this balance, or was it just shifted around?

A. It was shifted around from place to place. This was never paid up. It is still owing." [R. 519.]

"Q. [by Mr. Scampini] Whenever those individuals wanted any money they would go down to the

Merchants Ice & Cold Storage Company and help themselves and shift the books around and charge it to this, that or the other?

A. Yes.

Q. That is the way they ran the Merchants Ice & Cold Storage Company?

A. Yes." [R. 520.]

At the time of the Bercut transaction, Merchants was insolvent. Its aggregate deficit for the ten years ending December 31, 1940, totaled \$543,501.25, R. 610. Its real estate taxes were in default and unpaid, R. 608; it had no funds with which to pay wages and neither it nor its affiliate corporations had cash or credit to be used for any purpose, R. 494-495, 606-608. The bill of the Pacific Gas & Electric Company was unpaid, and as a result of default and failure of the company to deliver on warehouse receipts for butter, the Bank of America was claiming \$38,000, R. 608. The publicity attendant on this claim had caused a complete loss of public confidence in the Merchants, with the result that the few remaining customers were afraid to put their merchandise in storage with Merchants, R. 627. Mr. Richards, one of the directors, had endeavored to interest other persons in the concern but to no avail.

Without drastic action by which additional managerial supervision and very substantial financial aid could be obtained, the Merchants would have had to close its doors, resulting in complete loss to the shareholders and partial loss to creditors. This condition was proved by the testimony of all of the witnesses produced by plaintiff.

The shares had a potential value to Bercut by reason of the fact that he was willing to pledge his individual credit and to labor for two years with no compensation in order to rehabilitate the concern. Based upon his own financial standing and endeavors the shares had a prospective value even though they had no present value. As testified to by Mr. Bercut, as a result of his purchase the option to purchase 20,000 shares retained by Pacific Empire Holdings had greater value than all of the shares sold to Bercut at the time of the sale.

(e) Peter Bercut was not a director of Pacific Empire Holdings, Inc., at the time of the deal. Finding III that he was a director until the first day of May, 1940, and finding VII that he was not a director subsequent to May, 1940, are supported by the evidence.

The findings are supported by the evidence when the whole is viewed and weighed.

At pages 41 to 50 of his brief appellant sets forth some of the evidence. The evidence is in conflict. Because of the conflict, appellant at his page 49 makes the partisan assertion that the testimony of Bercut was false. The trial judge, however, resolved whatever falsity may be implied from the conflict by finding it to be the other way around, i.e., that the testimony of Bercut was true. Some of his testimony is quoted by appellant at his pages 42 and 43.

Two things are confused by the appellant: (1) The actual resignation orally made about May 1, 1940; (2) the insistence of Bercut during the negotiations with him that there be a record of the fact of former resignation,

resulting in the writing being dictated by Arnold¹⁶ to the latter's secretary. The time of writing is unimportant; the time of actual resignation is the important thing. Appellant's quotation at his pages 42 and 43 leaves the two occasions confused. Other testimony supports the finding. Bercut testified, R. 320-321:

"A. [to Mr. Scampini] I never knew the difference between the two corporations, because they were so mixed. I meant both.

Q. You meant both of them?

A. Yes, sir.

Q. Now, to whom else did you say that you did not want to have any more to do with these companies on or about April, 1940?

A. My accountant told me to resign.

Q. Your accountant told you to resign; is that right?

A. Yes.

Q. I did not ask you that. I asked you to whom else besides Mr. Arnold in these companies, that is, the Pacific Empire Holdings and the Pacific Empire Corporation, you made known your intention not to continue as an officer or director.

A. I told Arnold.

Q. You just told Arnold and nobody else?

¹⁶The stenographer, Leona Keener, is quoted by appellant at his pages 44 to 47. That the document was dictated to her, that she typed it, that it was dictated at some date probably in January, and that the paper was backdated, is unquestioned. All that she says may be assumed to be true, excepting the fact as to *who* dictated it, which is comparatively unimportant, but as to which the trial judge impliedly found that Arnold, not Bercut, dictated it to Arnold's secretary. Bercut testified, R. 322:

"A. [to Mr. Scampini] That is my signature. I asked Mr. Arnold that I wanted to have it in writing, and he went into the office and he dictated that resignation himself. I never dictated anything to any of Arnold's stenographers."

A. That is all.

Q. You did not tell anybody else, did you?

A. No.

Q. You never sent in a resignation to either one of the companies later on, did you?

A. Later on I asked for my resignation in writing.

Q. You asked for your resignation first?

A. Yes, and I asked later to give it to me in writing.

Q. Let us get to the bottom of this thing. Did you ever file a written resignation as an officer or director of the Pacific Empire Corporation?

A. Yes.

Q. When did you?

A. When we started to deal on this, I told Mr. Arnold that I would like to have my resignation in writing.

Q. You mean that you told Mr. Arnold you would like to submit your resignation in writing?

A. No; I wanted to resign, but I wanted everything in writing.

Q. You wanted to file it in writing?

A. I wanted to go on record.

Q. When did you tell that to Mr. Arnold?

A. Just when we were dealing for the purchase of the Merchants Ice & Cold Storage Company."

He amplified, R. 323-324:

"Q. [by Mr. Scampini] Well, now, when did the negotiations for the deal begin, Mr. Bercut?

A. Along about sometime in December, 1940.

Q. And was the occasion upon which you signed this letter of resignation after the commencement of the negotiations with Mr. Arnold?

A. Yes.

Q. But you say it was before they were actually completed, is that right?

A. When I saw that there was a possibility of making the deal, I wanted to make sure I was not a director, because I had resigned to Mr. Arnold orally, and I wanted to be sure it was in writing."

Turning to the event or occasion of the fact of resignation nearly a year before, he testified, R. 324-325:

"Q. [by Mr. Scampini] You say you resigned on or about March 30, 1940, by telling Mr. Arnold that you were not going to be a director?

A. That is right.

Mr. Naus. He said about April.

Mr. Scampini. Q. About April?

A. About April.

Q. Why did you make that statement to Mr. Arnold?

A. We had difficulty between us two.

Q. What was the difficulty?

A. Well, they were rather personal. I loaned him \$2000.

Q. Give us all the facts.

A. He kept it some time and I asked him later on about it, and he finally gave me half of it back, and then I pressed him some more, and he gave me the other half, and he gave me his postponed check; and things did not look good to me any more, and I said I had better resign from these companies, they didn't look good to me.

Q. What companies are you referring to?

A. I was referring to the two companies. That is why I pressed him at that time."

The date of the precipitating matter of Arnold's postdated check was later fixed by documents. After relating the circumstances surrounding the making of the \$2000 loan,

R. 378-379, Bercut's personal check for \$2000 was received (printed at R. 380) for the limited purpose of fixing the date, which was January 15, 1940, R. 379-380. A monthly statement of a personal account of Bercut's in a bank (printed at R. 382) shows a deposit of \$1000 on January 31, 1940, which was identified as Arnold's "first [\$1000] payment on the \$2000", R. 381. A carbon of a bank deposit slip (printed at R. 384) shows a deposit of \$1000 by Bercut in a personal bank account of his on May 6, 1940, which was identified as the final repayment by Arnold, R. 383, 384. That was a check that had been postdated about two weeks to May 6, 1940, and fixes the date, and the precipitating cause, of the resignation as about two weeks before May 6, 1940; Bercut testified, R. 384-386:

"Q. [by Mr. Naus] So, was it on May 6, 1940, that you deposited Mr. Arnold's check for the second \$1000 that he paid back to you?

A. Yes.

Q. I understood you to say to Mr. Scampini this morning that on the second \$1000 Mr. Arnold gave you what you called a postponed check; you mean a postdated check?

A. Yes, postdated.

Q. Now, this postponed or postdated check that you deposited on May 6, 1940, you deposited it as soon as the date came that was written on the check, didn't you?

A. Yes, I was expected to hold it until that date.

Q. About how long in the future was the check dated or postdated when Mr. Arnold gave it to you?

A. Oh, I think about two weeks.

Q. It was postdated about two weeks?

A. Yes.

Q. Well, then, is it not the fact that he actually handed you this check approximately two weeks before May 6, 1940, the date you deposited it?

A. Yes.

Q. Do you fix the time of your statement or oral resignation to Mr. Arnold as the time when he finally gave you the postdated check?

A. Yes, because I had quite some trouble getting it from him.

Q. Tell the Court something about the difficulty you had in getting that second check from Mr. Arnold, after he had given you the first check.

A. I had to go several times, and most of the time they would tell me Arnold was not there, and finally I saw him, I caught him there, and he had to give me the check.

Q. He gave you the postdated check?

A. He told me it had to be postdated.

Q. That would be roughly two weeks before May 6, 1940, when he finally gave you a postdated check that you told him that you were through with these two companies?

A. Yes.

Q. Now, in one of the exhibits put in by Mr. Scampini for the plaintiff there is a reference to the resignation being backdated to March 31, 1940. In putting that back date on your resignation was that date selected by you or was it selected by Mr. Arnold?

A. It was selected by Arnold. I did not even know what date it was when he gave it to me.

Q. Have you any idea why Mr. Arnold selected the date of March 31, 1940, any more than he might have selected any other date?

A. The only thing I can think of, he had to get close to the date that I resigned."

(f) The negotiations were opened by Arnold and Maffei.

The reason for selling Merchants Ice stock were stated by Maffei, R. 290:

“Q. [by Mr. Naus] Now, tell me, Mr. Maffei, why did you and Mr. Arnold sell this block of Merchants Ice & Cold Storage company to Mr. Bercut?

A. On account of financial conditions.

Q. Well, can you keep in mind that this whole lawsuit is about that sale?

A. I understand.

Q. And that you are one of the defendants, here, and you have an attorney sitting over at the table where I am?

A. That is all right.

Q. All right, can you tell his Honor any more about why you sold that stock to Bercut than you have just said?

A. That is all we sold it for, on account of financial conditions, and finding ourselves pressed for finances; there was nothing else to do.”

In other words, the idea of selling originated with Maffei and Arnold. At first, they tried through director Webb Richards to work out a refinancing. Richards testified, R. 634-636:

“Q. [by Mr. Brownstone] Now, where was your office subsequent to February 15, 1938?

A. Well, that is a difficult question to answer for the reason that I had been engaged in reorganization work of several companies and I maintained an office from 1938, I was doing work for the Pacific Empire, and I believe had started on the Frostrcraft Corporation, and also was doing some work for the truck line and had offices at 242 Second Street.

Q. In connection with the reorganization of the truck line, that reorganization was completed?

A. That was completed.

Q. On or about November, 1940, is it or is it not a fact that you at least occupied a portion of your time at the office of the Pacific Empire Holdings?

A. That is correct.

Q. Is it or is not a fact that on or about November, 1940, Mr. Arnold requested you to interest any person whom you could interest in the purchase of the stock of Merchants Ice & Cold Storage Company then owned by Pacific Empire Holdings?

A. Mr. Arnold and I discussed for some time, the date would come within the time you mentioned, various methods of trying to relieve both the holding company and Merchants Ice & Cold Storage Company of their difficulties, and I made several efforts to get the company financed along various lines, I approached investment houses and also certain parties, too.

Q. Did you approach the firm of Stephenson Leydecker in Oakland?

A. Yes, naturally.

Q. Did you speak to R. D. Gross of the R. D. Gross Company here?

A. I did.

Q. And your net result of all your attempts was you were unsuccessful in interesting them in the purchase or refinancing of the Merchants Ice & Cold Storage Company?

A. That is correct.

Q. You knew that on or about this time Mr. Arnold was also negotiating with Mr. Bercut for the sale or refinancing of this Merchants Ice & Cold Storage Company shares of stock?

A. That is right.

Q. Now, Mr. Richards, can you estimate for us the period of time toward the end of the year 1940 during which you were endeavoring to interest other persons or firms in this block of Merchants Ice & Cold Storage Company stock? * * *

A. Let me make my position clear, as far back as the time we were successful in extending these bonds, we were trying to get the company on a financial basis, and the market was so weak that in normal procedure we could see it would be almost impossible, and whenever any of us thought of an idea we would try to work on it; I cannot remember any specific time like say November, 1940. I know that during that period we were attempting to cure their financial trouble.

Q. During the period of negotiations with Mr. Bercut, you, yourself, were endeavoring to interest other persons in the purchase of this stock?

A. That is right."

Arnold testified, R. 728:

"Q. [by Mr. Scampini] And what do you mean by 'we', when you said 'we negotiated its sale'?

A. I mean that we—that Maffei and myself on behalf of the holding company were endeavoring to work out a plan where—well, that would help and more or less save both companies, you might say.

Q. Well, now, what did you do pursuant to that intention?

A. Well, we opened the subject up for discussion with one or two places.

Q. Where did you open it up?

A. We discussed it at length with Mr. Gaither over at the Pacific National, and of course discussed it with Mr. Bercut; in other words, the financial—

Q. When did you first start to discuss it with Mr. Bercut?

A. It must have covered a period of thirty or sixty days, I guess.

Q. Who conducted the negotiations with Mr. Bercut?

A. Most of them were conducted by myself."

He further testified, R. 729:

"Q. [by Mr. Scampini] Well, what was the financial condition of the holding company which made it necessary that you have this transaction?

A. Well, our loans had been criticized over at the Pacific National.

Q. What loans?

A. The loans of the holding company.

Q. Yes.

A. We had a big government suit against us on the revenue stamp tax, and there were other obligations pressing.

Q. And was the financial condition of the Merchants involved, too, at that time?

A. Yes, the financial condition of the Merchants was very much involved at that time.

Q. Well, now, what did you say to Mr. Peter Bercut when you first opened the subject to him?

A. Well, I don't know as I can give my exact words.

Q. Well, give the best recollection that you have.

A. Well, we approached Mr. Bercut, or I did—either Mr. Maffei or myself. I believe I did.

Q. What did you approach him for?

A. For the purpose of—well, at that time we were endeavoring to work out some sort of an association with someone who had certainly more credit than we had.

Q. What do you mean—'we had'?

A. The Pacific Empire Holdings and the Merchants Ice & Cold Storage Company, both of them. We were at about the end of our situation so far as credit was concerned and so far as obtaining sufficient cash to meet our commitments, and we were endeavoring to associate ourselves with some partnership arrangement.

Q. With whom?

A. In this instance with Mr. Bercut."

Arnold's testimony makes it clear that the transaction with Bercut was initiated by Arnold and Maffei. Arnold testified, R. 771:

"Q. [by Mr. Goodman] This transaction with Mr. Bercut was initiated by yourself, was it not?

A. Yes.

Q. And because of the necessities of both companies—that is, the Merchants and the holding company—you were seeking to get financial help and additional leadership? That is correct, is it?

A. That is right.

Q. And when you first took up the transaction with Mr. Bercut, it is a fact, is it not, that he was reluctant to go into the deal?

A. At first he merely expressed interest—that is all.

Q. And isn't it a fact that he also told you at the time that he had many other business interests and was not anxious to increase his responsibility?

A. I believe he mentioned that at one time, yes.

Q. Did Mr. Bercut at any time bring any pressure to bear upon you or urge you to make the transaction?

A. I couldn't term it 'pressure', no.

Q. Well, did he ever urge you to make the transaction?

A. Not in that sense of the word, no."

Arnold made a proposal to Bercut that the latter buy "a majority" of the Merchants Ice block of stock at \$50,000, R. 733-734. Arnold testified, R. 734:

"Q. [by Mr. Scampini] What did he say to you after you proposed it to him?

A. Well, he expressed interest. He was somewhat skeptical because of our condition first, but he——

Q. Whose condition?

A. Merchants.

Q. Well, then, what did he say to you?

A. Well, I don't exactly know, but he said he wanted to look into it.

Q. All right. Did he look into it?

A. Yes, he did.

Q. Then what happened next?

A. Well, there was a lapse in our negotiations, probably twenty or thirty days.

Q. Then what happened?

A. During which time our condition did not improve.

Q. Then what happened?

A. Then we resumed our negotiations again.

Q. All right.

A. And——

Q. What did you say to him and what did he say to you?

A. Well, he expressed the fact—while we were negotiating, why, he naturally had found out about certain losses that were there, and we also had another loss that was somewhat publicized in the papers,

or a threatened loss, and he became somewhat hesitant upon working out the deal.

Q. What did he say to you?

A. However—well, on one occasion I have to admit he said that he didn't know whether he wanted to go through with it or not.

Q. All right. Then what happened?

A. There was another little lapse, and then we resumed again, and we were able to come to an understanding."

Bercut testified, R. 338-341:

"Q. [by Mr. Scampini] When was it that Mr. Arnold or Mr. Maffei first approached you on this deal which took place on January 8, 1941?

A. Sometime in December [1940].

Q. Who approached you?

A. Arnold.

Q. What did he say?

A. Well, it started this way: That we had a stormy meeting at the Merchants Ice & Cold Storage Company. One of the directors [Mr. Schinneller] made the statement that he was not satisfied with the management of the company, and there was only one man [Bercut] on this whole board that they thought could run this plant. * * * He [Arnold] said at that time, he told me, 'You know, Mr. Schinneller made the remark at the last meeting' that I should be manager of the company, or something of that kind; so I said, 'I am very sorry he said that, because it is nothing for me; I am not looking for a job, I am not looking for anything; I am satisfied to be one of the directors'. Then he said, 'We want to sell our stock, the majority stock or controlling stock', and I said, 'Well, I don't know if I am interested or not'. Well, he told me that he himself never made a suc-

cess of it for fifteen years, and they could not make a success, and maybe I could. And I said, 'What is your figure? What do you expect for it?'. And he said, '\$50,000'. And then negotiations stopped there, and I said, 'I will let you know'. Then he called me again, and I went there, and he said, 'Will you make an offer?'. And I made an offer of \$35,000, and I went away again. And he called me again, and then I came up and the third time that I came there was news that there was fraud in the butter or something of that kind; it was already in the [papers], you know, and I heard about it, and I said 'This looks like a bad mix-up; I am going to stay out of it'. And then he said he tried to settle the case himself so as to get me interested again, so he went down to the Bank of America and he offered to settle for \$38,000 if they gave him a long time to pay, a couple of thousand a month, in order to satisfy me. But anyway, I was not interested any more, so I went away for a whole month; I went to Los Angeles, and I stayed there a whole month, and then I came back and made inquiry about how much the loss would be, and he [said] it would be between \$30,000 and \$40,000, and I finally made an offer, and he took me down to the bank and gave me the stock and made the bill of sale and everything, and I thought that was all right, so I said, 'Now you have all these matters settled between yourself and Mr. Maffei, and I want to see Mr. Maffei and tell him', and he said he had a perfect right, and they were willing and they would go all through the negotiations that would be necessary.

Q. Did you see Mr. Maffei?

A. Yes.

Q. When Mr. Arnold first approached you he asked you for \$50,000?

A. Yes.

Q. For all the stock or half of the stock?

A. No, he told me all of the stock.

Q. 50,000 for all of the stock?

A. Yes.

Q. You are sure?

A. Yes.

Q. Did he offer to sell you half of the stock for \$50,000?

A. No.

Q. Why weren't you willing to accept the suggestion that you become president of the Merchants Ice & Cold Storage Company?

A. My experience in business tells me unless you have control you can't handle it without too much interference from people that have no experience, you cannot have success.

Q. When it was suggested that you become president, you would not be interested unless you had control of the Merchants Ice & Cold Storage Company; is that right?

A. Yes.

Q. When Mr. Arnold approached you to buy this control, you say he offered to sell to you for \$50,000 and you made him an offer?

A. Yes.

Q. How much did you offer?

A. \$35,000. I never changed."

Bereut took over the management of Merchants Ice on February 1, 1940, R. 386, and immediately fired Arnold, Maffei and Morrish out of the management of Merchants Ice, R. 392, and commenced physical rehabilitation of the run-down plant, R. 386, 611-613. He appointed a new manager, W. G. Evans, R. 593-594. There was but \$2000 cash on hand, R. 611, with \$162,710.71

credit or cash provision needed through 1941, R. 611, 612. More gross business or sales was badly needed, R. 487 (Morrish), which Bercut went out into the trade to bring in, R. 615.

(g) Miscellaneous corrections.

The principal additions to, and corrections of, appellant's statement are contained in the foregoing affirmative statement of the record by us. There are a few miscellaneous matters to which we will refer under the page numbering of appellant's brief:

Page 8: He says that Merchants Ice never defaulted in the payment of any of its obligations or in meeting its bond maturities. The point is that a 5-year moratorium had been obtained through the 77B proceeding and the deal with Bercut was made near the end of that 5-year period, i.e., somebody would have to put up \$20,000 in cash by March 1, 1941, with the indenture trustee, a month ahead of the due date of April 1, 1941.

Page 13: There is an innuendo that Arnold helped himself to the funds of Merchants Ice for his personal use. Nothing in the record supports the innuendo. The record abundantly discloses the movement of funds back and forth between the corporations but the movement was all recorded in the account books of the corporations.

Page 29: He asserts that the pledge of the block of Merchants Ice shares by Pacific Empire Holdings, Inc. to Pacific Empire Corporation "had never been satisfied or released". To the contrary, Plaintiff's Exhibit 9

printed at R. 114, et seq., is a contractual arrangement under which Pacific Empire Holdings, Inc. was one of three parties thereto, and under which the block of shares was pledged to the third party thereunder (Joseph McInerney) and contractual representation was made therein that the shares were then "free and clear", R. 116, and that contract is signed, R. 121, on behalf of Pacific Empire Holdings, Inc. by Maffei as president and Arnold as secretary, and on one of the originals of the contract in the hands of Pacific Empire Holdings, Inc. appears the following notation, R. 121:

"Original also has
signature of
P. Empire Corporation
L.R.A."

The initials L.R.A. being the initials of Arnold. It is therefore evident from the record that by the date of that contract, April 24, 1936, the previous pledge to Pacific Empire Corporation had been released, or else by the signature of Pacific Empire Corporation thereto the contractual arrangement itself operated to release the previous pledge.

Page 38: He would have it appear that Bercut refused an offer of a million dollars for the block of Merchants Ice shares. In the first place, no such offer was ever made to him and has not been made to him in an acceptable form up to the present moment. All that happened was that Mr. Scampini, as a cross-examiner, tossed a million dollars around in a conversational way and what he now omits at his page 38 is the following comment by the trial Court and by Mr. Bercut, R. 344:

“The Court. It is speculative.

A. [by Mr. Bercut] They are not offering me that money.”

Page 38: He states that no directors, other than Maffei and Arnold, were consulted respecting the Bercut sale. The record shows that director Heer (an office employe of Pacific Empire Holdings, Inc.), knew about it; that director Ryerson was shortly afterwards informed of it; and that director Richards was actively making an effort to refinance the companies and knew about the transaction with Bercut when it was made. In short, the record shows that every one of the directors knew about it excepting director Giachini who lives away from San Francisco and did not testify. The record simply does not disclose clearly one way or the other whether he had knowledge or not.

Pages 38-39: He states that director Webb Richards did not know the “true” details of the transaction until about August 20, 1942. The record does not support that statement. The appellant’s references are to R. 638, where director Richards testified that it was not until that time that he knew the “complete” details, but the same page of the record contains his answer that he knew that the deal had been made when it was made.

Page 50: He states that as the result of the transaction the Holding Company found itself without assets. After the transaction, the Holding Company was still the owner of a 47½% interest in California Pacific Service, Inc. and was still the owner of 52% of the outstanding stock of Pacific Empire Corporation. Although appellant further states at his page 50 that these shares were

previously pledged to Kohler & Chase, the fact is that they were not pledged to Kohler & Chase until on or about April or May, 1941, some three or four months subsequent to the transaction with Bercut, R. 257.

Page 53: He states that on September 9, 1942, the receiver "repudiated and rescinded" the transaction of January 8, 1941. His reference to the record does not support the statement. Plaintiff's Exhibit 34, R. 393-395, is not a notice of rescission. It is a letter that uses only the word "repudiate" and was written and signed by Mr. Scampini as attorney for the receiver. "Repudiation" by a receiver is an altogether different thing than a rescission. Repudiation by a receiver relates only to those portions of a contract which are still executory and simply operates to give notice that the receiver will not perform the executory remainder of a contract. At R. 603 will be found the details as to the number of shares of Merchants Ice that the Bercuts are still short in delivery from their promissor, i.e., they are still short 3522 shares of common and 208.33 shares of preferred. The repudiation by the receiver therefore put them on notice that as to that executory portion of the contract it was up to the Bercuts to present a claim for damages in the receivership.

Page 73: It is suggested that there is no dispute about the testimony of Morrish that "the prospects and future of Merchants Ice were increasingly bright". Those words are not the words used by Morrish in his testimony and his testimony has to be overstrained to use them at all; but in any event the record at large does not justify

the statement that the testimony of Mr. Morrish is "undisputed".

Page 78: After stating on page 77 that the by-laws with respect to the authority of the executive committee may be found printed in Part I of his appendix (wherein it appears that the executive committee is given authority to exercise all the powers of the board of directors "but subject to the immediate disaffirmance by the board at its next meeting") he states that the next meeting of the board was held on August 20, 1942, that the Bercut deal was discussed thereat, and that thereat at its first opportunity upon learning of the deal the board repudiated the transaction. The statement is not warranted by the record as the board did not repudiate the transaction at all. The board simply consented to the appointment of a receiver. The record at bar shows abundant justification for the appointment of a receiver without regard to repudiation of the Bercut deal.

Page 93: He repeats the same misstatement that at that meeting the board "emphatically disaffirmed the deal". The record does not support the statement.

Page 116: He states that it cannot be denied that the insolvency of Pacific Empire Holdings, Inc. resulted directly from the Bercut deal. It is denied, not only by us but by the trial Court, because in finding IX, at R. 951, the Court found that it was not the sale of the Merchants Ice shares to Bercut that rendered Pacific Empire Holdings, Inc. insolvent and that the financial condition of the corporation was due to causes other than the sale of said shares.

II.

ARGUMENT.**“Points Nos. 1 and 3.”**

The case comes to this Court with a finding, in substance, that Bercut ceased to be a director on May 1, 1940. That is more than eight months before the transaction of January 8, 1941. It is six months before the beginning of the negotiations that resulted in the transaction. In our statement, *supra*, under I(e), we have spread credible evidence clearly supporting the finding, i.e., showing an oral resignation about two weeks before an identified event that occurred on May 6, 1940. The whole of the argument for appellant at his pages 61 to 65 is one that depends upon a solution of testimonial conflicts and credibility.

Appellant, at his page 63, asserts that under the by-laws a resignation of a director must be first “duly accepted” and in support of that assertion he refers to “Part I of Appendix” to his brief. His reference is incomplete because Part I of his Appendix is incomplete. Turning to the record the portion of the by-laws relating to directors is found under Article IV at R. 74p. On the next page, R. 74q, will be found “Section 4, Vacancies”, and “Section 5, Resignation”. Appellant quotes merely a portion of Section 4, having to do with the matter of a vacancy being deemed to exist in the board of directors on the occasion of a “resignation duly accepted”; but when we turn to the next section, “Section 5, Resignation”, we find that under that section, which deals directly with the matter of resignation of a director, *acceptance* of the resignation is required when the “res-

ignation would reduce the number of directors to a number less than necessary to form a quorum of said board". In other words, the by-laws do not require or call for acceptance of a resignation whenever the number of remaining directors would amount to a quorum or more. At bar, the board of directors consisted of seven and a quorum consisted of four. Bercut's resignation left six directors on the board, or two more than a quorum. The by-laws therefore did not, and do not, condition the effectiveness of his resignation upon an acceptance.

An oral resignation is sufficient: *Clark v. Oceano Beach Resort Co.*, 106 Cal. App. 574, 576, 289 Pac. 946, 947; 14a C. J. 73, § 1836; 19 C. J. S. 69, § 736(b); *Briggs v. Spaulding*, 141 U. S. 132, at 154,¹⁷ 35 L. Ed. 662, 671. The California case just cited, and C. J. and C.J.S., add that "an acceptance is not necessary to render the resignation effective, unless it is tendered to take effect on acceptance", which the one at bar was not. Upon the single question decided in *Security Investors' Realty Co.*

¹⁷At this page the Supreme Court said: "The resignation was orally tendered to the president, and manifestly accepted by him, since the sale of the stock was made at the same time, and the president informed the cashier of the fact a few days afterwards. Putting a resignation in writing is the more orderly and proper mode of procedure, but if the fact exists, and is adequately proven, the result is necessarily the same as applied to this case. We do not understand that because § 5145, Rev. Stat., provides that directors shall hold office for one year, and until their successors have been elected and have qualified, this prohibits resignations during the year; and while the Banking Law is silent as to the time when and the method by which the office of director may be resigned, we think that leaves it as at common law, and that this resignation was effective. *Rex v. Rippon*, 1 Ld. Raym. 563; *Olmsted v. Dennis*, 77 N.Y. 378; *Chandler v. Hoag*, 2 Hun. 613, 63 N.Y. 624; *Bruce v. Platt*, 80 N.Y. 379; *Port Jervis v. First Nat. Bank*, 96 N.Y. 550."

v. Superior Court, 101 Cal. App. 450, 281 Pac. 709, it was said:

“The whole question to be determined in this matter is whether or not the said Meserve was, at the time of the service of the said summons and complaint, secretary of or a director of said corporation.

Some point is made of the fact that in the by-laws of said corporation it is provided that ‘each director shall serve for the term for which he shall have been elected and until his successor shall have been duly elected and have qualified * * *’, and also ‘the executive officers of the company shall be a president, vice-president, secretary and treasurer. The president, vice-president, secretary and treasurer shall be elected annually by the board, and shall hold office until their successors are appointed’.

Quoting from 7 Ruling Case Law, p. 427, § 416: ‘Resignation: An officer of a corporation may terminate his office by resignation, if the statutes, charter and by-laws impose no limitation thereon, and, in doing so, he need give no notice to the public nor to persons dealing with the corporation’.—citing *Zeltner v. Henry Zeltner Brewing Co.*, 174 N.Y. 247, 66 N.E. 810, 812, 95 Am. St. Rep. 574, and note therein. ‘The fact that a statute requires directors, unless removed, to continue in office until their successors are appointed, does not prevent a director from resigning at any time’ citing *Briggs v. Spaulding*, 141 U.S. 132, 35 L. Ed. 662 [671]. ‘Since an officer may resign, as a rule, at pleasure, no action on the part of the corporation is essential to make his resignation effectual. Acceptance thereof by the directors or governing body is not required. When he tenders his resignation to the proper corporate authorities, to take effect immediately, the resignation is complete, although it

is not acted on by the corporation or entered in its books. * * *

It was said in the cited case of *Zeltner v. Henry Zeltner Brewing Co.*, supra: 'When we come to consider the general right of officers and directors of corporations to resign, we are at once reminded of the limitations of the question certified to us. We may admit, for the purposes of this discussion, that, as a general rule, such officers may resign at will, and that the validity of such resignations does not depend upon their formal acceptance.' Quoting from *Briggs v. Spaulding*, supra: 'The resignation was orally tendered to the president, and manifestly accepted by him, since the sale of the stock was made at the same time, and the president informed the cashier of the fact a few days afterwards. Putting a resignation in writing is the more orderly and proper mode of procedure; but if the fact exists, and is adequately proven, the result is necessarily the same, as applied to this case. We do not understand that because section 5145, Rev. St. [12 USCA § 71] provides that directors shall hold office for one year and until their successors have been elected and have qualified, this prohibits resignations during the year; and while the banking law is silent as to the time when and the method by which the office of director may be resigned, we think that leaves it as at common law, and that this resignation was effective'."

Examination of the Delaware cases¹⁸ cited at appellant's pages 63 and 64 will disclose that they do not decide or

¹⁸*Bowen v. Imperial Theatres, Inc.*, 13 Del. Ch. 120, 115 Atl. 918, merely relates to the probative effect of recitals in minutes. It is sufficient to say that Peter Bercut never signed any purported minutes of either of the Pacific Empire corporations of

discuss the foregoing propositions; indeed, do not touch them. His California citations¹⁹ are even more barren.

Clearly, the valid finding of fact, and the law, are against appellant, in consequence of which it results that the transaction of January 8, 1941, was one between the corporation and a stranger, at arm's length. That being so, it would be proper for this Court to affirm the judgment without passing on the remainder of the argument, because it is merely in the alternative as it assumes *arguendo* that Bercut was a director at the time of the transaction. Simply to meet the brief of appellant fully, we now turn to the remainder of his argument.

"Point No. 2."

This presents a pure question of fact, i.e., sufficiency of the evidence to support the finding, VII, at R. 948, that the block of Merchants Ice shares was not worth more than \$35,000, and that the price of \$35,000 paid by Bercut for them was a fair, reasonable and proper price. The

purported meetings held subsequent to his oral resignation of May 1, 1940. *Lippman v. Kehoe Stenograph Co.*, 11 Del. Ch. 190, 98 Atl. 943, does not hold what appellant states at his page 64 that it holds; it merely states, 98 Atl. at 948, col. 1, that the director *withdrew* his resignation at a meeting after tender and before action thereon, and from the long statement of facts in that case it may be gleaned that he remained present and acted as a director throughout the same meeting. *Re Chelsea Exchange Corp.*, 18 Del. Ch. 287, 159 Atl. 432, merely recites, at 159 Atl. at 435, col. 2, in substance that the resignation was accepted upon tender, and therefore does not touch the question of effect, if any, of non-acceptance.

¹⁹6a Cal. Jur. [1065] § 591, *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485 [8 Pac. 22], and *Reed & Co. v. Harshall*, 12 Cal. App. 697 [108 Pac. 719]. They relate merely to questions of evidence unrelated to resignations.

sufficiency of the evidence is shown under our statement, *supra*, part (d).

It is only by an assumption that the finding is untrue, i.e., by assuming that the block of shares was worth \$250,000, that appellant leads into the remainder of his argument. The falsity in his premise of value destroys the argument, and for that reason the judgment should be affirmed.

“Point No. 4.”

It is to be noted that appellant cites no authority hereunder. He states, at his page 68, that he postpones his argument against the authority of Maffei and Arnold to his Point 8(a), and so will we. He next states, his page 69, that Finding VII that the transaction was fair and equitable and that it was entered into in good faith after lengthy negotiations at arm's length, is an “unbelievable” finding, but his premise for the assertion is that *he* chooses to ignore the substantial portions of the evidence that support the finding. That is all there is to his argument. However, the trial judge resolved the evidentiary issues, the conflicts in evidence, and credibility, by accepting those substantial portions of the evidence that appellant has a partisan preference to ignore.

“Point No. 5.”

The false assumption by appellant under this point is that it was the sale to Bercut that rendered Pacific Empire Holdings, Inc., insolvent. Its solvency or insolvency was unaffected by the transaction. The consideration of \$35,000 has been found to be fair. The flaw in the argument of appellant appears at his page 71 where he

assumes that the price of \$35,000 was but "a nominal consideration". Remove that false premise and the argument falls. If we assume insolvency at the time of the transaction on January 8, 1941, the transfer for a valuable consideration was nevertheless a valid transfer, *Security Trust Co. v. Silverman*, 210 Cal. 578, 292 Pac. 636.

"Point No. 6."

(a) At his page 72, appellant first complains of the finding, X, R. 951, that on January 8, 1941, Merchants Ice & Cold Storage Company was insolvent, that it had no funds with which to meet its payments and that it was about to collapse financially. The finding is probably unimportant one way or the other because, as to Merchants Ice, the question is whether the block of shares in it was worth more than \$35,000. In any event, the evidence supports the finding. As shown in our statement, *supra*, Merchants Ice had operating losses every year during the ten years ending December, 1940, in an aggregate exceeding \$500,000. It had but \$2000 cash on hand, R. 611, with \$162,710.71 credit or cash provision needed through 1941, R. 611, 612. Its current liabilities always exceeded current assets, R. 483-484. Its balance sheet as at December 31, 1940, R. 490-491, shows current liabilities of \$187,540.01 as against current assets of \$124,242.86, of which an aggregate of \$58,218.14 turned out to be worthless, R. 606-607. We quote from the cross-examination of appellant's "star" witness Morrish, R. 494-495:

"Q. [by Mr. Naus] Can you or not tell me whether as of December 31, 1940, the Merchants Ice

& Cold Storage Company was getting in fairly desperate need for cash to continue in business?

A. Yes, they needed cash.

Q. I will repeat my question: Can you or not tell me whether or not at the end of 1940 they were desperately in need of a substantial amount of cash?

A. Not any more than they had been in the past.

Q. You mean it was rather customary or habitual for the Merchants Ice & Cold Storage Company to be in desperate need of ready cash?

A. They were always short of cash."

And the balance sheet of December 31, 1940, did not include the butter receipts loss which had to be settled with \$22,000 cash shortly after Bercut took over the management, R. 303, 495, 608. Further, we quote Arnold, R. 731:

"A. Well, the Merchants was badly in need of financial assistance, and we were at the end of our rope and we couldn't supply any.

Q. [by Mr. Scampini] You mean you couldn't supply any more capital to the Merchants?

A. No more—no more capital; either the holding company or——

Q. By that you mean the holding company?

A. The holding company. The corporation had done that in previous years, but we were not able to do that any more."

(b) Next, at his page 73, appellant states that "The rest of finding X purports to find facts", etc., some of which findings he then states, but without attacking the sufficiency of the evidence to support them. The facts found clearly show laches, from January 8, 1941, over a period of nearly two years; and they also show *acquies-*

cence throughout the same period. Through the years 1941 and 1942, "Maffei and I", testified Arnold, "often commented on how well we heard they were doing", R. 815. Mr. Scampini stated in the course of a colloquy, R. 814, that "as soon as Mr. Peter Bercut got there, who was a competent business man, it became a very fine concern". In other words, they sat by for a couple of years and awaited the event, and then when the danger was over which had been at the risk of Bercut, they sought to come in and share the profit. The law does not permit that. We cite the leading case of *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328, wherein, with respect to the purchase by an individual director of land of the corporation, the Court said:

"The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may be reasonably done, after the party with whom that right is optional is aware of the facts which give him that option, are numerous and well collected in the brief of appellees' counsel. The more important are as follows: *Badger v. Badger*, 2 Wall. 87 [69 U. S., XVII., 836]; *Harwood v. R.R. Co.*, 17 Wall. 78 [84 U. S. XXI., 558]; *Marsh v. Whitmore*, 21 Wall. 178 [88 U. S. XXII., 482]; *Vigers v. Pike*, 8 Cl. & F. 650; *Wentworth v. Lloyd*, 32 Beav., 467; *Follansbee v. Kilbreth*, 17 Ill. 522.

The cases of *Clegg v. Edmondson*, 8 DeG., M. & G., 787; *Prendergast v. Turton*, 1 Younge & C. (Ch.) 98, while asserting the same general doctrine, have an especial bearing on this case, because they relate to mining property.

The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which would sell for \$1000 as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.

While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option whether they will share its risks or stand clear of them."

While it is true that what was said in that case about the fluctuating character and value of property relates to oil wells, that portion of the discussion relates only to the element of time in the consideration of laches; and it is to be remembered that in the case at bar we have a corporation that in its losses and earnings fluctuated from a loss of \$17,000 in 1939 and a loss of \$54,000 in 1940, through a profit of \$4000 in 1941 and one of \$156,000²⁰ in

²⁰Bereut testified, R. 387-388:

"Q. [by Mr. Naus] Take the year 1942, the statement here shows that in that year there was an operating profit for

1942. That is high fluctuation and calls for as prompt action by the corporation in any attempt to rescind as was the case in *Twin-Lick Oil Co. v. Marbury*, supra. We need not burden the Court with the many subsequent cases to be found in Shepard's citator, in which the doctrine

the year of \$156,401.98. By the way, that was before the Federal taxes, was it not—that was before the payment of Federal corporation income taxes?

A. Yes, before the Federal.

Q. After the payment of the Federal corporation income taxes on that \$156,000 did you not take what was left and use it in order to pay and retire amounts of principal on the bond issue, or else put it back into the buildings in an effort to rebuild the property?

A. That was it.

Q. Since you have taken over the management have either you or your brother taken out a penny by way of salary or compensation or dividends or profit of any kind?

A. No, I didn't think that they could afford it.

Q. And you always put it back and still are trying to rebuild the property?

A. Yes.

Q. And is there still a good deal of that to be done to put it in proper shape?

A. I am spending all of my time working on it."

Gross sales, i.e., gross revenue received from customers in payment of all operations of Merchants Ice, ran as follows:

Year	Amount
1937	\$436,097
1938	354,688
1939	386,404
1940	371,350
1941	453,599
1942	845,647

W. G. Evans, who had been put in by Bereut as manager of Merchants Ice on February 1, 1941, testified, R. 615:

"Q. [by Mr. Naus] Now, as a matter of fact, the year of 1942 ended up with good operating results, largely, did it not, through the practically doubling of the gross business?

A. Yes.

Q. Now, in jumping up the gross business done by the company for the year 1942 to something over \$800,000 a year, did or did not Mr. Peter Bereut go out into the trade and bring in new business?

A. Yes, he did."

as to laches in rescinding stated in *Twin-Lick Oil Co. v. Marbury* has been applied. The rule is a well-settled one.

Twenty months elapsed from the transaction in January, 1941, until the board meeting in August, 1942.

At bar, during the twenty months that elapsed after the transaction and after the date that the appellant now concedes Mr. Bercut resigned, Mr. Bercut succeeded in accomplishing a substantial change in the management of Merchants, and a substantial change in its net worth, and a substantial change in the value of the block of Merchants stock. This was not accomplished all at once or over night, but was a slow, laborious and hazardous process and included the loaning of some money by him and his brother to Merchants and the giving of an individual guaranty of \$100,000 to a bank, R. 508, to create a new credit for Merchants. While all this was going on, Arnold and Maffei and Pacific Empire Holdings, Inc. stood by and left all the risk and hazard to the Bercuts. In *Alexander v. Phillips Petroleum Co.*, 10 Cir., 130 F. 2d 593, at 605, col. 2, the Court spoke very aptly to such a situation, as follows:

“A person may not withhold his claim awaiting the outcome of a doubtful enterprise and, after the enterprise has resulted in financial success favorable to the claimant, assert his interest, especially where he has thus avoided the risks of the enterprise. The injustice of permitting one, holding the right to assert an interest in property of a speculative character, to voluntarily await the event and then decide, when the danger is over and the risk has been that of another, to come in and share the profit, is obvious. In such circumstances, persons having claims to property are bound to use the utmost diligence in enforcing them.

A substantial increase in the value of the property involved, where the right could have been asserted before such increase and the granting of relief would work inequity, is a circumstance which may be considered in applying the doctrine of laches.

Where a plaintiff, with knowledge of the relevant facts, acquiesces for an unreasonable length of time in the assertion of a right adverse to his own, the court may presume assent to the adverse right, and the consequent waiver of the right sought to be enforced.

Laches will not be imputed to one who has been justifiably ignorant of the facts creating his right or cause of action, and who, therefore, has failed to assert it. But where the facts were known to the plaintiff, ignorance of the law applicable thereto and the consequent ignorance of his legal rights, will not ordinarily excuse delay in asserting the claim."

The Court supported the foregoing statement by an imposing array of authorities from many jurisdictions, including California. The facts of the cases cited by appellant at his pages 74 and 75 are so widely different that they are not in point. Moreover, in each of them the purchasing director remained as a director. At bar, even on the appellant's theory of the evidence, Bercut was not a director after January, 1941. He was a stranger to Pacific Empire Holdings, Inc., during the two years that Maffei and Arnold sat by and observed him and Merchants Ice.

"Point No. 7."

At his page 76, appellant appears to complain that Findings XII, R. 953, and XIII, R. 954, are in the form of

legal conclusions as distinguished from ultimate facts. They follow, however, the language in which appellant presented the issue in his complaint, R. 16-18, and are therefore sufficient. As said in *Rauer v. Bradbury*, 3 Cal. App. 256, 260-261, 84 Pac. 1007, 1009, col. 1:

“For a similar reason the proposition of appellant that the findings are insufficient to support the judgment, upon the ground that the principal finding is merely a conclusion of law and not a finding of fact, is untenable. The finding is a negation in identical language of the allegation of the complaint. The only purpose of findings is to answer the questions put by the pleadings, and if the facts are stated in the findings in the same way that they are stated in the pleadings they are sufficient. *Dam v. Zink*, 112 Cal. 91, 44 Pac. 331; *McCarthy v. Brown*, 113 Cal. 15, 45 Pac. 14, and cases therein cited.”

“Point No. 8.”

(a) Appellant’s principal argument hereunder is that, as stated at his page 79, “the president of a corporation has no authority, *merely by virtue of his office*, to effect a sale of a substantial part of the assets of a corporation”. That proposition may be deemed correct, and hence no time need be spent on the many authorities cited by him to that simple and elementary proposition. However, it does not meet the record at bar.

Here, the finding, VII, R. 947, is not merely that Maffei and Arnold acted “*merely by virtue of their offices*”. The finding is that they were “*acting within the course and scope of their authority*”. The record discloses greater authority than mere occupancy of an office. It shows ten years of entire management of the affairs of the Pacific

Empire corporations without meetings being held; a habit of entire management, a continuous course of authority. There is more here than merely the authority of a president *ex officio*. As said in 6a Cal. Jur. 1152:

“There is a distinction implicit and not always mentioned between presidential authority and power and managerial authority which the president has when he is the corporation’s general manager or executive. Cases holding that the president lacks certain powers do not always mean that as general manager he would lack them. This distinction is expressly recognized by the courts.”

And he may be a general manager *de facto*, *Hoffman v. Guy M. Rush Co.*, 27 Cal. App. 167, 149 Pac. 177. It has been said that he “may be considered as virtually the corporation itself”, 19 C.J.S. 99, §756; and at the following page 100 it is said:

“The office of general manager is of broader import than that of president. The fact that a person having an active conduct of the business of a corporation is also its president does not operate as a limitation on the powers usually exercised by its general agents or managers; his authority is not limited to that possessed by virtue of his office as president but is incidental to the management of the business.”

And the case also comes within the rule of authority stated in the Delaware case of *Joseph Greenspon’s Sons v. Pecos Valley Gas Co.*, 156 Atl. 350, wherein at pages 352-353 it is stated:

“A fifth and perhaps the most usual source of the grant of the unusual or extraordinary powers of a President arises by implication of law from a course of conduct on the part of both the President and the

corporation showing that he had been in the habit of acting in similar matters on behalf of the company and that the company had authorized him so to act and had recognized, approved and ratified his former and similar actions.

As said in *Stokes v. New Jersey Pottery Co.*, 46 N.J. Law, 242:

'There are cases in which the powers of an officer of a corporation, and his authority to act for the company, are enlarged beyond those powers which are inherent in his office. But those are cases in which the agency of the officer has arisen from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the direction and control of the business of the company. * * * Thus, when, in the usual course of the business of a corporation, an officer has been allowed in his official capacity to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. * * * These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon the agent—a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations. * * * In such cases, the authority of the officer does not depend so much on his title, or on the theoretical nature of his office, as on the duties he is in the habit of performing.' "

It will be seen that that Delaware case, through the principle or rule laid down in the foregoing quoted passage,

supports power or authority exercised by Arnold and Maffei, the executives of the corporation arising from the long course of permitted conduct.

Moreover, in the case at bar the corporation is not of the ordinary type, such as a trading or manufacturing corporation, or the like, where its principal asset is needed in the conduct of its business, but at bar we have a corporation that was organized for the sole purpose of dealing in securities—the dealing in securities was to be, and was, its only and ordinary business and the transaction at bar was nothing more than a dealing in securities.

Furthermore, under the law of Delaware, in effect at the time of this transaction, it will be found that § 9 of the General Corporation Law of Delaware provided:

“The Board of Directors may, by resolution or resolutions, passed by a majority of the whole board, designate one or more committees, such committee to consist of two or more directors of the corporation, which to the extent provided in said resolution or resolutions or in the by-laws of the corporation, shall have and may exercise the powers of the Board of Directors in the management of the business and affairs of the corporation and may have power to authorize the seal of the corporation to be affixed to all papers which may require it. Such committee or committees shall have such name or names as may be stated in the by-laws of the corporation or as may be determined from time to time by resolution adopted by the Board of Directors.”

In the by-laws of the corporation, in evidence as Plaintiff's Exhibit No. 7, the “Powers of Directors” are stated in Article IV and therein, under the subheading “Delegation of Management,” it is stated that

“The directors shall also have the power to appoint an executive committee to transact the business of the corporation as hereinafter set forth.”

Thereafter it is “set forth”, in Article VII, under the general heading, “Executive Committee” and subheading “Powers” that

“Any executive committee appointed by the board of directors shall have authority to exercise all the powers of the board of directors when said board is not in session, but subject to the immediate disaffirmance by the board at its next meeting after receiving the report of the acts done by said committee. Such committee may act by the written consent of all its members although not formally convened.”

From the foregoing statute of Delaware and the foregoing quotations of the by-laws, it will be seen that in the management of the affairs of the corporation at bar there was clear authority for an executive committee and that the committee could act informally, i.e., it did not need to convene formally or even to keep informal, or any, minutes of its informal action—the signatures of the executive committee members were sufficient. Moreover, it clearly appears in the testimony of Mr. Arnold that it was a common practice for the executive committee to meet and act informally, R. 827-828, and they never called a meeting in any case when the members of the executive committee signed the papers of a transaction, R. 828.

Again, any “disaffirmance” by the board was required by the by-laws to be “immediate”, and not only was there no “immediate disaffirmance” by the board here, but it

did not meet for twenty months after the transaction, i.e., not until August 20, 1942, and the minutes of that date do not disclose a disaffirmance.

Finally, there is the rule of *adoption* of an unauthorized act through inaction over a period of time. At bar, the period is at least twenty months. In the case of *Roth v. Ahrensfield*, 27 N.E. 2d 445, the question before the Court was whether an unauthorized act of the president of the corporation had been adopted through inaction of the board over a period of eighteen months amounting to an acquiescence in the act. It was held that it did amount to adoption through acquiescence. *Inter alia*, the Court said:

“Defendant does not deny that its delay in disaffirming should be interpreted as approval, except by its contention that the other officers and stockholders had no knowledge of Jones’ transaction during the intervening period. A president is not disqualified from dealing with the corporation he represents, though his contracts with the corporation may be disaffirmed and will be set aside if tainted with the slightest unfairness. *Dixmoor Golf Club v. Evans*, 325 Ill. 612, 156 N.E. 785. If there is any delay in repudiating, the court will inquire whether avoidance will cause an injustice to any one. *Higgins v. Lansing*, 154 Ill. 301, 40 N.E. 362. Although no rights of third persons would be prejudiced, such a contract, nevertheless, will be upheld if by affirmative ratification or by actions amounting to acquiescence the corporation has adopted it. *Louisville, New Albany & Chicago Railway Co. v. Carson*, 151 Ill. 444, 38 N.E. 140. When the corporation, through its disinterested officers or stockholders, has been completely informed of the contract over a long period of time and has not indicated its disapproval in any way, it may be con-

cluded that the president's action has been adopted. *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 45 N.E. 410, 56 Am.St.Rep. 187; *Beach v. Miller*, 130 Ill. 162, 22 N.E. 464, 17 Am.St.Rep. 291."

The Courts of California have ruled the same way. In the case of *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 387, 89 Pac. 86, at 91, a Mr. Doe, as the *de facto* general manager of a corporation, had entered into a contract on behalf of the corporation. It was contended that he had no authority to act but the Court pointed out that after he had made the contract, knowledge that he had done so had come to the attention of a *majority* of the board of directors who "took no measures to disaffirm" the contract and it was held that the corporation was bound by the contract through the inaction of the board, i.e., through the failure to take "measures to disaffirm". We quote:

"As they [a majority of the board] had such knowledge, it was their duty promptly to disaffirm the action of Mr. Doe, if it was unauthorized. Not having done so, they are deemed in law to have ratified it. The majority of the board having knowledge of the facts, it was not necessary to conclude the corporation in favor of plaintiff, that his employment should be ratified at a regular meeting of the board. It was sufficient that the majority of the board individually were advised of the terms of the employment of plaintiff by Mr. Doe, and took no measures to disaffirm as directors that employment. *Pixley v. W. P. R. R. Co.*, 33 Cal. 184, 196, 91 Am. Dec. 623; *Crowley v. Genessee Mining Co.*, 55 Cal. 273, 275; *Gribble v. Columbus Brewing Co.*, 100 Cal. 69, 72, 73, 34 Pac. 527; *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, 77 Pac. 817."

At bar, the evidence clearly shows that the contract with Mr. Bercut was publicized at the time it was made. And the evidence further shows that at the time the contract was made five of the members of the board of seven knew that it had been made and made no attempt to take any "measures to disaffirm". A recent case showing an application of this rule in California is *Thompson v. M. K. & T. Oil Co.*, 5 C. A. 2d 117 at 123-124, 42 Pac. 2d 374 at 377, where it was held that it is immaterial whether a "legal" meeting was held—that the majority of a board of directors may formally authorize a contract at a formal meeting of the board, or in the alternative there may be no meeting at all, but the contract is equally valid in the absence of a meeting if, when a majority of the members of the board learn about the contract, they take no step whatever to disaffirm it.

And the same result may be reached in our case along a slightly different line. The plaintiff-receiver contends that Mr. Bercut did not resign as a director until January 29, 1941. While we dispute that the resignation was as late as that, we will for the present assume that the resignation did not occur until January 29, 1941. However, *after* that date, i.e., at a time in February, 1941, there was performance and acceptance of performance under the contract and subsequently, in April, 1941, the corporation accepted \$3950 from Mr. Henri Bercut in the course of further performance. In such a context our Supreme Court has said:

"Plaintiff also objects that the oral contracts under which the court found he had been employed were not authorized by resolution of the board of directors. It is well settled, however, that when the

corporation with full knowledge of the contract accepts performance and makes payments on account thereof, there is a ratification of the contract, or an estoppel to deny its validity. *Tierney & Lawford, Inc. v. Wilshire Cafe, Inc.*, 209 Cal. 605, 289 P. 621; *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, 386, 89 P. 86; *Scott v. Superior Sunset Oil Co.*, 144 Cal. 140, 77 P. 817; *Pacific Bank v. Stone*, 121 Cal. 202, 53 P. 634; 6a Cal. Jur. pp. 1181-1189."

Berry v. Maywood Mut. Water Co. Number One, 13 Cal. 2d 185, at 190, 88 Pac. 2d 705, at 708.

As an attempted makeweight to his principal argument under the present heading, appellant at his page 89 in a casual observation (he says, "It is appropriate to observe here") says that the sale to Bercut required consent of a majority of the outstanding stock of Pacific Empire Holdings, Inc., because what was sold to Bercut was *all* of the property of the corporation. The Delaware law provides as follows (General Corporation Law, § 65):

"Sec. 65. Sale of Assets and Franchises:—Every corporation organized under the provisions of this Chapter, may at any meeting of its Board of Directors, sell, lease, or exchange all of its property and assets, including its good will and its corporate franchises, upon such terms and conditions and for such consideration, which may be in whole or in part shares of stock in, and/or other securities of, any other corporation or corporations, as its Board of Directors shall deem expedient and for the best interests of the corporation, when and as authorized by the affirmative vote of the holders of a majority of the stock issued and outstanding having voting power given at a stockholders' meeting duly called for that purpose, or when authorized by the writ-

ten consent of the holders of a majority of the voting stock issued and outstanding, provided, however, that the Certificate of Incorporation may require the vote or written consent of the holders of a larger proportion of the stock issued and outstanding."

The Delaware statute is substantially identical with the California statute cited in the following cases: *Shaw v. Hollister Land Co.*, 166 Cal. 257, 135 P. 965; *Baldwin v. American Trading Co.*, 76 Cal. App. 80, 243 P. 710; *Loney v. Consolidated Water Co.*, 122 Cal. App. 350, 9 P. 2d 888; *Boteler v. Bagby*, 14 Cal. App. 2d 139, 55 P. 2d 1207. The type of statute here involved is designed to permit, with the consent of a majority of the shares, the sale of *all* of the assets of the corporation including its good will and its *corporate franchise* and, as held in the preceding cases, is applicable only in the event that the sale includes *all* of the assets of the corporation, including its good will and its corporate franchise. Even though a corporation disposes of all of its physical assets, the consent of shareholders is not necessary and the statute is not violated and action by the board of directors is sufficient, without any action by the stockholders at all.

At the time of the sale of the Merchants stock to Bercut, the corporation owned a 47½% interest in the laundry at Bakersfield and was the owner of 52% of the outstanding stock of Pacific Empire Corporation. The laundry shares were pledged as security for a small obligation and the Pacific Empire Corporation shares were not in pledge at the time of the Bercut transaction. At a subsequent date they were pledged with Kohler & Chase as security for a \$13,300 obligation. That the

receiver believed they had substantial value is evidenced by the fact that he paid this obligation and redeemed the shares.

Even if all of the assets of the corporation, including the Merchants shares, were pledged as security for the payment of obligations in excess of their value, it cannot be argued that the corporation owned only the Merchants stock. Its interest in the Pacific Empire Corporation and in the laundry at Bakersfield was a substantial part of its assets and there is no evidence that the stock of Merchants was all, or substantially all, of its assets. }

(b) Plaintiff's tirade against Bercut at his pages 94 to 101 is merely a transparent effort to ignore the facts found and postulate his ensuing law argument upon the false premises (1) that Bercut was a manager of Pacific Empire Holdings, Inc., (2) that the block of Merchants Ice shares was worth vastly more than \$35,000, and (3) that in the negotiations ending in the transaction of January 8, 1941, the selling corporation was *represented* by Bercut as its negotiator. From his false premises he proceeds at length at his pages 101 et seq. into his main cases of *Guth v. Loft, Inc.*, 5 Atl. 2d 503 (affirming 2 Atl. 2d 225), and *Pepper v. Litton*, 308 U.S. 295, 84 L. Ed. 281. Those cases²¹ and the others cited by appellant

²¹In *Pepper v. Litton* the corporation's transaction was with one who controlled the voting power of the stock and dominated the board, as a result of which the transaction was held invalid; Litton had simply fixed the paper terms for both himself and his "one-man" corporation. In *Guth v. Loft, Inc.*, Mr. Guth "dominated Loft [the corporation] through his control of the board of directors" (5 Atl. 2d at 506), i.e., the facts show that he represented not only himself on one side but at the same time represented the corporation on the other side.

clearly distinguish. Their sound basis in reasoning has been as clearly stated by the Supreme Court of California as by any Court. In *Smith v. Pacific Vinegar & Pickle Works*, 145 Cal. 352, at 362-363, 78 Pac. 550, 552-553, the Court said:

“This rule is based on sound public policy, and there also enters into it the legal principle that, in order to make an express contract, there must be the assent of two separate independent minds; that no man can effectually make a contract with himself. In the case at bar, the respondent Smith assumed to constitute himself both the contracting parties. There is no pretense that he was dealing with the corporation represented by other members of the board of directors, or with other agents thereof. He was dealing with himself, contracting as president with himself as an individual, and was the contracting party on both sides. The corporation made no sale of these notes to, or contract of indorsement thereof, with him. He adjusted the whole matter, dictated the terms of the transfer by himself with himself, completed the transaction in this unilateral capacity, and it was the result solely of his own discretion and volition. To this situation the language of the court in *Mercantile Mut. Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 411, may pertinently be applied: ‘A contrivance which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself, is so far against the policy of the law that the contract is held to be void, unless the principal chooses afterwards, and with knowledge of all the circumstances that affect his possession, to ratify the act of his agent’. In *Clark & Marshall’s Private Cor.* vol. 3, § 759, the rule is concisely summed up in this language: ‘A

person cannot, as director or other officer of a corporation, enter into a valid contract on behalf of the corporation with himself in his individual capacity, or be both vendor and purchaser, for two persons are necessary elements to the formation of a contract. The fact that he acts as an officer of the corporation, on one side, and for himself on the other, can make no difference'."

The rule was put in a nutshell in *Pepper v. Litton*, supra (308 U.S. at 306-307):

"The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's-length bargain."

Here, Finding VII, R. 947-948, is that the "agreement of sale * * * was entered into in good faith after lengthy negotiations, at arm's length, by and between the said corporation acting through independent and disinterested officers and directors and the said Peter Bercut, and upon a full disclosure of all facts relating thereto". That brings the facts into a different line of authority, to which we turn:

As said in *Morawetz on Private Corporations* (2d ed.), § 527:

"The incapacity of the agents of a corporation to bind it by making contracts with themselves personally, rests solely on the principles of the law of agency. There is no arbitrary rule of law prohibiting contracts between a corporation and its agents, where these principles have no application. Thus, if an agent does not assume to represent the corporation in entering into a contract with it, but deals with another independent agent, who has authority

to act for it, the transaction will be unobjectionable
 * * * There is no necessary impropriety in a contract between a director and the corporation, if the latter is represented by other agents. On the contrary, such contracts are, in many instances, the natural result of circumstances, and are justified by the approved usages of business men.”²²

A leading American case is *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 23 L. Ed. 329. There, the purchase by a director of an asset of the corporation was sustained; he was, said the Court, but “one director among several” and he had no domination or control of the board. In *Smith v. Pacific Vinegar Works*, supra, it was said (145 Cal. 352, 367, 78 Pac. 550, 554-555):

“This marked distinction is plainly declared in a line from one of the cases cited by respondent (*Lick Oil Co. v. Marbury*, 91 U.S. 590) where the court says, ‘The defendant was not here both seller and buyer’.”

The authorities are collected and their result stated in 3 *Fletcher, Corporations*, § 931. In 14a *C.J.* 118 (note 31) and 19 *C.J.S.* 151-152 (note 17) the rule with respect to the validity of transactions with directors when the corporation is represented “by **independent** officers or agents” is stated and many authorities collected thereunder. In 6a *Cal. Jur.* 1116 it is said:

²²As said the other day in *Okin v. Securities and Exchange Commission*, 2 Cir., 137 F. 2d 398, 401, col. 2:

“Indeed, from National’s [the corporation’s] standpoint, it would seem most natural to dispose of the investment to those most interested; that would be where the best price might well be found.”

“A distinction is made between cases where an officer of the corporation as such deals with himself in an individual capacity concerning corporate property without the knowledge and consent of the corporation or its stockholders, and those cases in which such officer consummates a transaction in his individual right with the consent of the corporation and without having himself taken part as an officer in the transaction. Thus, where the corporation is represented by its general manager, and the transaction is free from fraud, the fact that the party dealt with is a director does not render the contract void without regard to actual fairness or unfairness. The rule that where an officer deals with the corporation it is a violation of his trust, applies only where his conduct is in the nature of an attempt to unite his personal and representative characters in the same transaction, and where his official action is an essential part of the corporate action.”

(c) At his pages 115 et seq. appellant argues that the transfer of the shares was fraudulent as to creditors, and he lays his argument on California Civil Code, §§ 3439.04 and 3439.07. The latter relates to an actual intent to defraud creditors, and the former makes a conveyance fraudulent without regard to intent if *thereby* the transferee is rendered insolvent, or if the conveyance is made “without a fair consideration”. Neither of the Code sections applies in view of Finding IX, R. 951, which reads:

“The sale of said shares of Merchants Ice & Cold Storage Company, as aforesaid, did not render Pacific Empire Holdings, Incorporated insolvent or unable to meet its debts or other obligations and was

not in fraud of its stockholders and creditors or its stockholders or creditors. The financial condition of said corporation was due to causes other than the sale of said shares."

And Finding VII, R. 948, that \$35,000 "was a fair, reasonable and proper price for said shares", and they "were reasonably worth a sum not in excess of \$35,000". Those findings being clearly supported by the evidence, the argument of appellant is without basis in the record.

A consideration is a "fair consideration" if it is "a fair equivalent", *Calif. Civil Code*, § 3439.03. It has been said that "'Fair consideration' means a consideration which under all the circumstances is honest, reasonable and free from suspicion, whether or not strictly 'adequate' or 'full'", *Ferguson v. Dickson*, 3 Cir., 300 Fed. 961, 964. At bar, the consideration was more than merely "fair"; it was adequate and full.

"Point No. 9."

Under the preceding "Points" the sufficiency of the evidence to support the findings has been discussed. The present Point No. 9 appears to confuse the situation. It cannot be doubted that the facts found support the conclusions of law and the judgment. If it is the thought of appellant that, in a case where the facts are specially found, he may nevertheless attack the *judgment* for insufficiency of evidence, he is answered by *Hayne, New Trial and Appeal* (rev. ed. 1912), § 96, where it is said:

"It is not the judgment, but the verdict or decision of facts, against which the attack should be directed. It is inexact to say, that the judgment is

not supported by the evidence. The judgment rests upon the verdict or findings, and the verdict or findings upon the evidence. The judgment may be supported by the verdict or findings, which may be entirely unsupported by the evidence, and *vice versa*."

CONCLUSION.

On January 8, 1941, the date of the Bercut purchase, the Merchants Ice was an insolvent concern. For ten years, ending December 31, 1940, it had lost money in every year and its aggregate operating deficit for the ten years totaled \$543,501.35. Its real estate taxes were in default and unpaid; the corporation had insufficient funds with which to pay wages; the Pacific Gas & Electric Company was unpaid; and it had no cash and no credit and its affiliated corporations had neither cash nor credit. It was faced with a claim of the Bank of America in the amount of \$38,000. Without immediate and substantial support and managerial change, which would create confidence in the customers of the Merchants, the Merchants Ice was doomed and not only would there have been nothing for the stockholders, but the creditors would not have been paid in full. The corporation was rehabilitated upon a pledge of Bercut's individual credit in the amount of \$100,000 and upon a pledge of his reputation and ability to operate the corporation as a going concern. Without the transaction, the stock was worthless. We might here state that what the appellant here is attempting is what Mr. Arnold had in mind when he testified that when he and Mr. Maffei learned of the suc-

cess of Bercut they thought it would be a very good thing if they could once again obtain a position in the company. It is not going too far to say that Mr. Scampini had the same idea and that he could now see sufficient assets, quoting him, "to pay a good fee to the receiver and its attorneys, etc., etc., and probably leave something available for the stockholders". At the time of the transaction Mr. Bercut was not a director of Pacific Empire Holdings, Inc.; he was not the manager of that corporation; he dealt at arm's length with the managers of it and it was represented independently in the negotiations by them; and the price paid was all that the block of shares was then worth. Nearly two years went by before it occurred to Maffei or Arnold to attack the transaction, and when they finally did attack it they assumed the guise of co-defendants in the course of a stratagem to deflect a threatened attack upon them based generally on matters other than the transaction with Bercut.

The case comes to this Court with full, fair and clear findings that are well supported in the evidence, and the judgment should be affirmed.

Dated, San Francisco, California,
February 4, 1944.

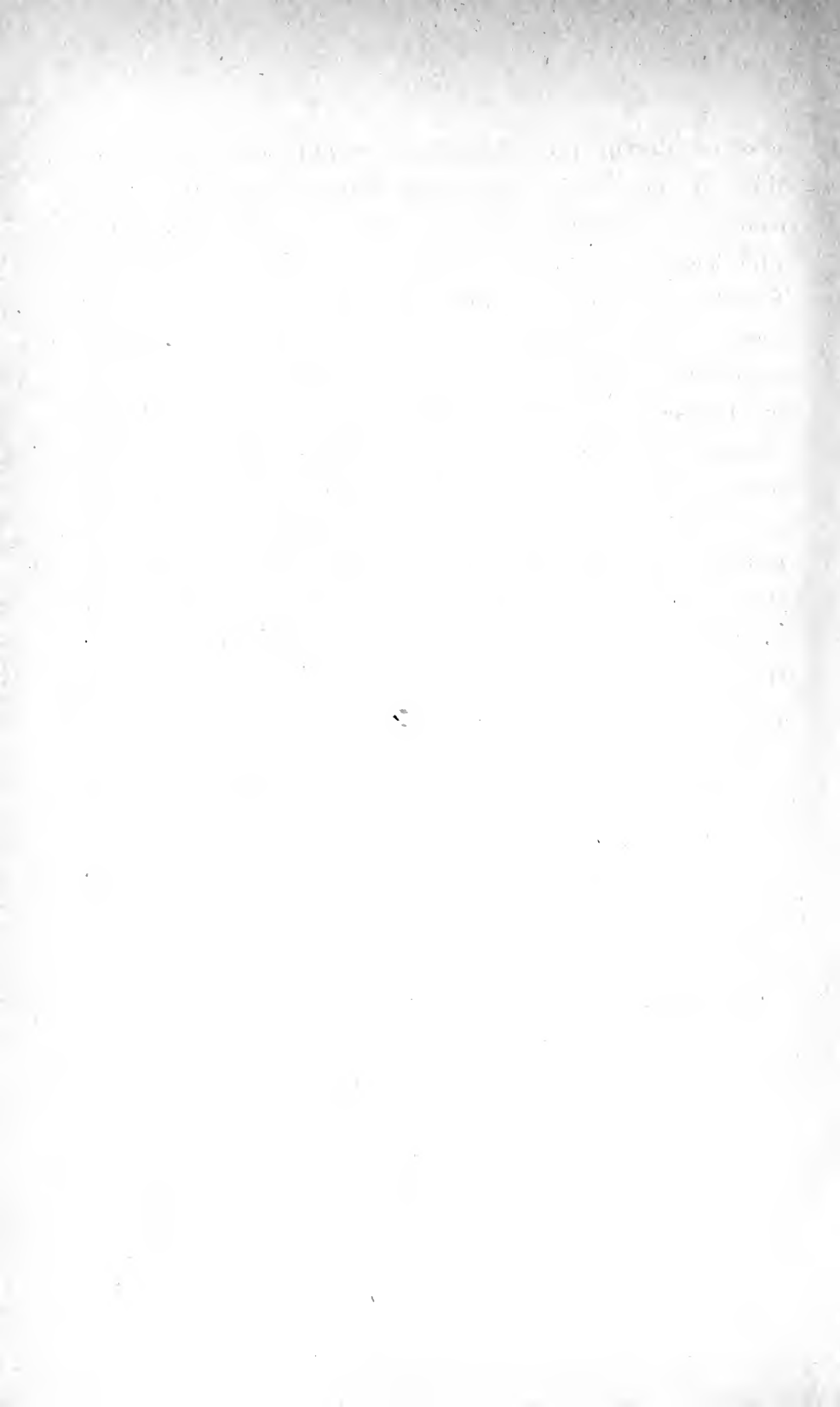
Respectfully submitted,

GEORGE M. NAUS,

LOUIS H. BROWNSTONE,

Attorneys for Appellees

Peter Bercut and Henri Bercut.



No. 10,550

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THOMAS H. WINGATE, as Receiver in Equity
for Pacific Empire Holdings, Incorporated (a corporation of the State of
Delaware),

Appellant,

VS.

PETER BERCUT, HENRI BERCUT, M. MAFFEI
and L. R. ARNOLD,

Appellees.

BRIEF FOR APPELLEES M. MAFFEI AND L. R. ARNOLD.

J. A. PARDINI,

ELDA GRANELLI,

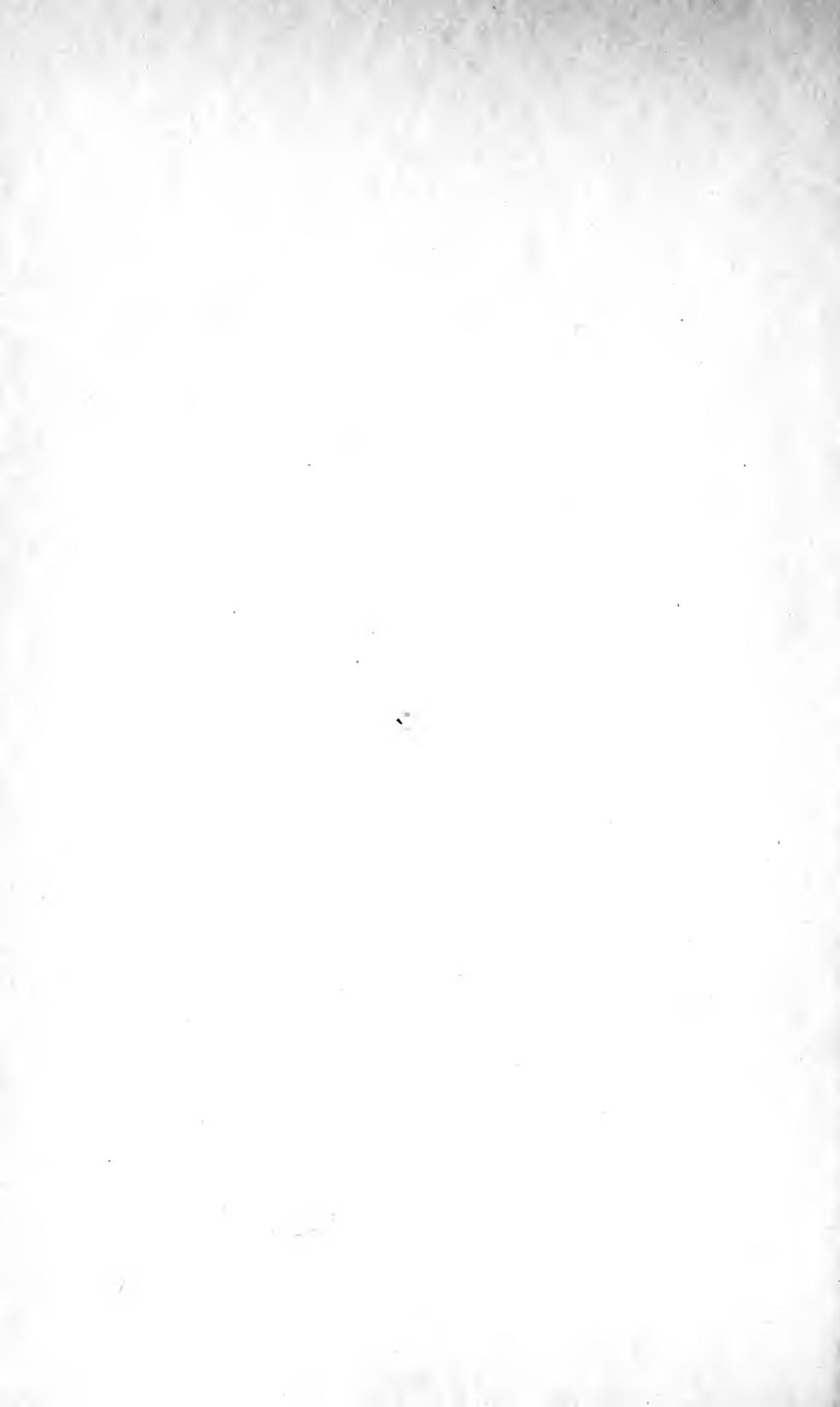
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M. Maffei and L. R. Arnold.

FILED

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No. 10,550

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BRIEF FOR APPELLEES M. MAFFEI AND L. R. ARNOLD.

Appellant contends that the evidence supports *either* the First Count, on the theory that the Appellees Henri Bercut and Peter Bercut are trustees of the shares in question for Appellant; *or*, the Second Count that title to the shares of stock never passed at all, remained and at all times have been and now are in Appellant; *or*, the Third Count on the theory that various Appellees, including Appellees M. Maffei and L. R. Arnold converted said shares *to their own* use and benefit and so owe their value.

With counsel's authorities, we have no quarrel.

There is, however, no shred of evidence to support any possible theory claim upon which Appellees, M. Maffei and L. R. Arnold, can be held liable for either an accounting, a trust or a conversion of the stock, and no part of the exhaustive analysis of the evidence by Appellant has shown otherwise.

The evidence shows that there was a transfer of the stock to Peter Bercut and Henri Bercut and no one else and that no one else of Appellees has or ever had any possible interest in or control over the stock or received any consideration therefor. The failure of Appellant to demand the stock or even address the "suit" letter to these Appellees shows that no serious claim was ever considered against these Appellees until they were joined as Appellees.

If either of Appellant's contentions, to-wit: that title never passed from the Pacific Empire Holdings, Inc., or that Henri Bercut and Peter Bercut are holding the shares as trustees for Appellant, are correct, then certainly the Appellees, M. Maffei and L. R. Arnold, are in no way liable to Appellant herein. They merely and at most performed a useless and idle and possibly a careless act in signing an illegal and void document and if no title to the stock could pass thereby, then while Appellant may have his rights against the person who took physical possession of the stock, certainly he can have no rights or claims whatsoever under the present form of action against these Appellees, who did not take the stock and do not assert any claim therein.

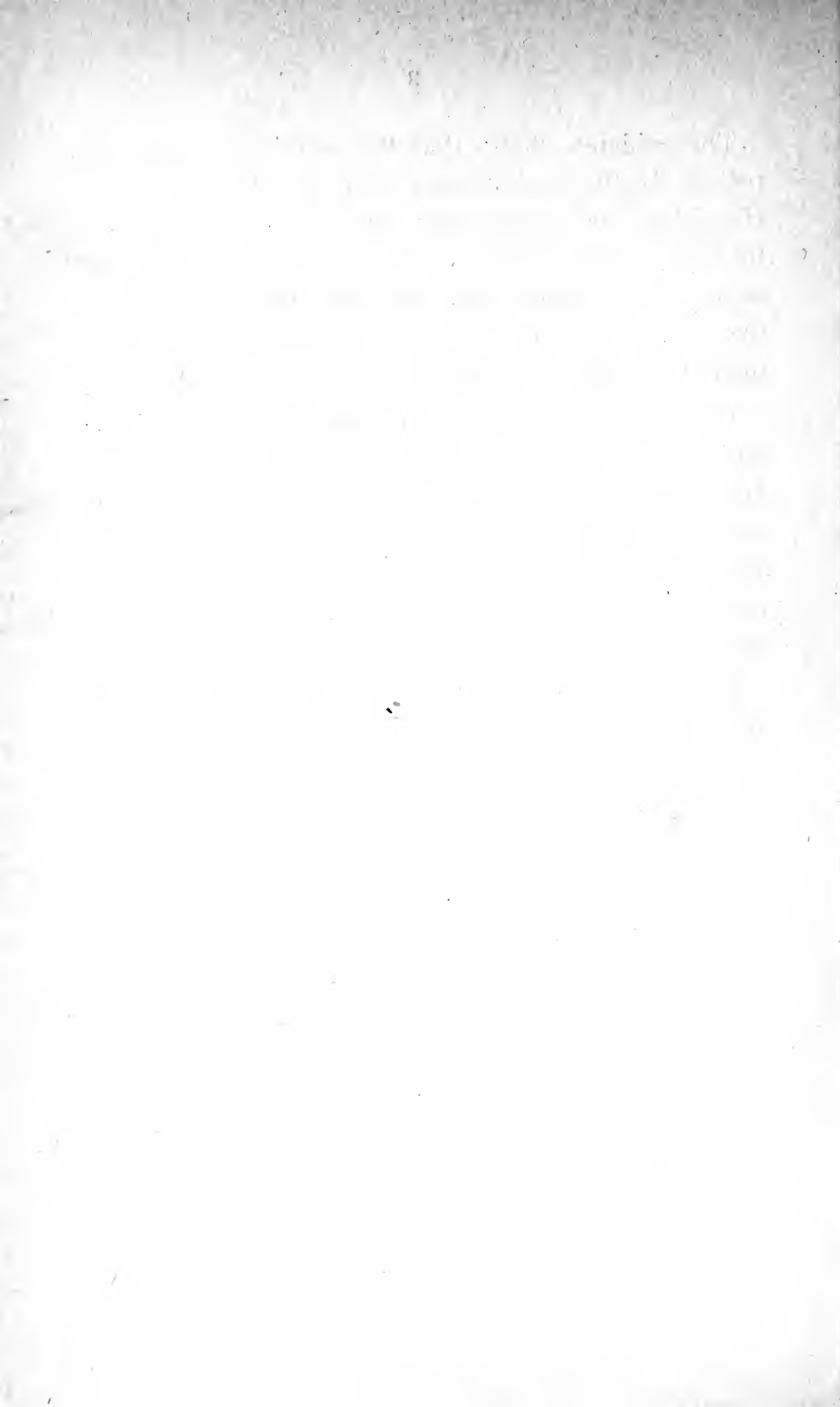
The evidence shows that the activities of said Appellees Maffei and Arnold with the Pacific Empire Holdings, Inc., ceased after the transfer of the stock; that they were ousted by the controlling faction just as any mere employees; that they own no interest in the stock and have derived utterly no benefit from the purported sale of the same.

In conclusion, if the sale is a valid one, then Appellant should have no judgment against these Appellees. If the sale is a void one, if there is a trust or a conversion, Appellant still should have no judgment against these Appellees because they have not nor have they ever had any right or title in, over or to said shares or the profits and income therefrom.

It is respectfully submitted that as to Appellees, M. Maffei and L. R. Arnold, the appeal should be dismissed and that these Appellees have their costs.

Dated, San Francisco,
February 4, 1944.

J. A. PARDINI,
ELDA GRANELLI,
Attorneys for Appellees
M. Maffei and L. R. Arnold.



19
No. 10,550

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 6

THOMAS H. WINGATE, as Receiver in Equity
for Pacific Empire Holdings, Incorporated (a corporation of the State of Delaware),

Appellant,

vs.

PETER BERCUT, HENRI BERCUT, M. MAFFEI
and L. R. ARNOLD,

Appellees.

APPELLANT'S CLOSING BRIEF.

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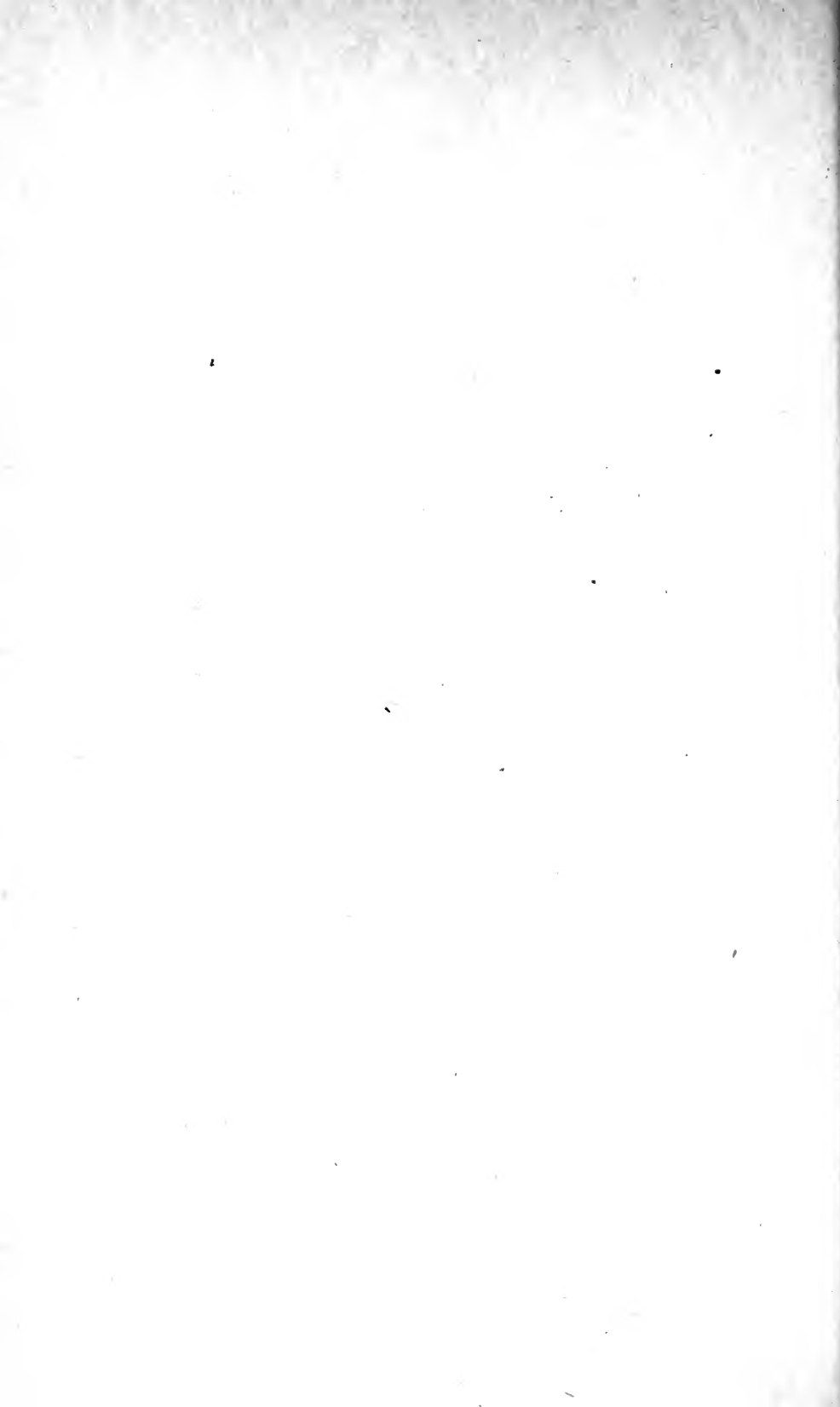
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Attorneys for Appellant.

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No. 10,550

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THOMAS H. WINGATE, as Receiver in Equity
for Pacific Empire Holdings, Incorporated (a corporation of the State of Delaware),

Appellant,

vs.

PETER BERCU, HENRI BERCU, M. MAFFEI
and L. R. ARNOLD,

Appellees.

APPELLANT'S CLOSING BRIEF.

May it please the Court:

It is conceded that the entire case is open to review of the Circuit Court of Appeals under Rules of Civil Procedure (Rule 52 (a)). In fact the appellant desires just that, knowing that a complete review of the case both as to law and facts can alone show the total disregard of fact and law by the trial judge in rendering a decision for defendants.

I.

REPLY TO THE ARGUMENTS OF APPELLEES.

The entire brief of appellee, regardless of how you look at it, is a smoke screen to justify a gigantic fraud, to legalize, under the guise of apparent legality, sophistry and skillful camouflage, an unlawful taking of practically all of the assets of a corporation, and then to accuse those endeavoring to expose it of a conspiracy by innuendo.

Appellees in paragraph 1 of their "Statement of the Case" state "that appellant's case is based entirely upon the *false assumption* that what we bought at the fair price of \$35,000 was at the time worth \$300,000", and then admit:

"Certainly, if we did buy at \$35,000, something that at the time was worth \$300,000, such a gross inadequacy of price would have shocked the conscience of the judge who presided over the trial in the court below and would invalidate the transaction in any court, trial or appellate, on any theory. No court would have any difficulty in finding some theory of invalidation, whether Ber-cut was at the time of the transaction a director or not, although the fact is that he was not."

The astounding situation in this case is just exactly this—that the conscience of the trial judge was not shocked, as has been that of everyone who has knowledge of the facts of this obvious fraud and colossal swindle perpetrated by the concerted action of three persons intimately connected for many years with the corporation involved, as officers, directors, voting trustees and/or executive committee men.

REPLY TO APPELLEES' POINT (a).

PETER BER CUT WAS ONE OF THE MANAGING FIDUCIARIES OF THE HOLDING COMPANY ON JANUARY 8, 1941.

In appellees' point (a), page 5 of their brief, it is contended that Peter Bercut had never been manager of Pacific Empire Holdings Inc., Pacific Empire Corporation or Merchants Ice & Cold Storage Co.

Let us concede this for the purpose of argument, but not otherwise. He was, however, a director of all three—and a member of the executive committee of Pacific Empire Holdings Inc. The affairs of the Pacific Empire Holdings Inc. of which he was the third member of the executive committee, were managed by said executive committee, the personnel of which was Messrs. Maffei, Arnold, and Peter Bercut, three of the defendants in this action. Of the three, perhaps the two defendants Maffei and Arnold were the most active, but they fully informed and advised the third member of the committee, Peter Bercut. (R. 723.)

Management of Pacific Empire Holdings Inc. was vested in the executive committee, and full and complete minutes were prepared and signed by all three, indicating full approval by all. (R. 327-330.)

At this stage in the game, the successful business man, the Napoleon of Finance, by his own admission (R. 318), Peter Bercut, would have this Court believe that he never read the minutes, didn't know the difference between the corporations, was unaware of what was going on, and signed them simply because requested to do so. It strains the credulity of a two year old.

It is submitted that it is immaterial as to who were the "managers" individually—of course the officers were, and initiated most actions, but they did so as members of the executive committee of three, who were in turn representatives of the Board. The committee cannot shirk the responsibility to the board, nor to the stockholders, by claiming it did not hold formal meetings. Whether its meetings were formal or informal, its actions breaching its fiduciary relations with the corporation and its stockholders cannot be justified.

Shall a member of the board of directors and of the executive committee be permitted to shirk his fiduciary duties and then be heard to say he is not liable because he was not the "manager" of either of these corporations? To the contrary, doesn't he owe a duty to protest those actions which are unsound, contrary to good policy and tainted with fraud, and detrimental to the best interests of the corporation, on whose board of directors he sits?

REPLY TO APPELLEES' POINT (b).

MINUTE BOOKS OF THE VARIOUS CORPORATIONS INVOLVED ARE TO BE CONSIDERED TO ESTABLISH COURSE OF CONDUCT AND AUTHORITY OF OFFICERS, DIRECTORS AND EXECUTIVE COMMITTEE.

Appellees' point (b) under Statement of Case, states that the District Court was not bound to accept as true the "minutes" of Pacific Empire Holdings Inc. or of Pacific Empire Corporation.

The evidence will show that Mr. Maffei testified that meetings of Pacific Empire Corporation were not held (R. 274) but there is no testimony that meetings of Pacific Empire Holdings Inc. were not held (R. 288-9); failing which these minutes are *prima facie* evidence of the actions of the Board and are binding upon the trial Court. There was no evasion on the part of Maffei as to meetings of Pacific Empire Corporation. He was frank and positive that there were none, so far as he could recall.

Meetings, however noticed and held and wherever held, of a board or of an executive committee, are legal and valid if signed and approved by all directors or members of executive committee.

Delaware Corporation Law, Section 32, 81;
Civil Code of California, Section 307b.

We have just that situation in the case at bar. Whether meetings were actually held, formally or informally, and agreed upon, it is sufficient for the purpose of the statute.

REPLY TO APPELLEES' POINT (c).

THE ARGUMENT OF APPELLEES PETER BERGUT AND HENRI BERGUT THAT DEFENDANTS M. MAFFEI AND L. R. ARNOLD ARE IN REALITY ALIGNED WITH THE PLAINTIFF.

The appellees Peter Bergut and Henri Bergut have, at pages 11 to 16 of their brief, deliberately sought to confuse the Court and cloud the real issues involved in this case by dragging out a red herring and parad-

ing it before the Court as a form of conspiracy between the plaintiff, his attorneys and defendants Maffei and Arnold to get the defendant Peter Bercut. They seek to create this most false impression by extracting a few lines from a long letter written by Mr. Scampini to Mr. Culbertson (found at pages 426-433 of the Record), setting them out in their brief in an artificial order, forgetting entirely the rest of the letter which contains the real meat of the situation, and which letter, when read in its entirety shows a most sincere desire on the part of all parties concerned to protect *in full, first of all, the rights of the creditors of the Holding Company*, secondly, the rights of its stockholders, and last of all the rights of the receiver and his attorneys.

It is respectfully submitted that a reading of all the correspondence referred to will dissipate completely the wholly unwarranted innuendoes made by counsel for said appellees in their brief. This correspondence, found at pages 424 to 438 of the record, though privileged, was permitted to go into the record by Mr. Scampini, so that all of the facts might be known to the trial Court.

It should be here noted that no one can rightfully deny that on August 20, 1942, and for a long time prior thereto Pacific Empire Holdings, Inc. was insolvent. When its holdings in Merchants Ice and Cold Storage Company were transferred to defendant Peter Bercut it had nothing left of any real value. (R. 225, 884.)

The last meeting of the directors of said company had been held immediately following the stockholders' meeting of February 15, 1940. The last executive committee meeting was held on October 17, 1940. The last stockholders' meeting was held on February 15, 1940. No stockholders' meeting was held either in 1941 or 1942. The management continued to be exercised by the defendants Maffei and Arnold who, finding no assets with which to stave off creditors' claims, proceeded to pledge all the stock owned by the Holding Company in Pacific Empire Corporation with Kohler & Chase. They also pledged the stock owned by the Holding Company in California Pacific Service, Inc. (R. 884), and when these pledges were foreclosed sometime in 1942 the Holding Company found itself with no assets at all and with liabilities in excess of \$300,000.00. These are the facts which undoubtedly compelled counsel for said appellees to admit at page 48 of their brief: "The record at bar shows abundant justification for the appointment of a Receiver without regard to repudiation of the Bercut deal."

This was the situation when the defendants Maffei and Arnold went to Mr. Scampini to ascertain what should be done in view of the threatened lawsuit in Delaware.

It should be emphasized here that Mr. Scampini had not been an officer, director or attorney for any of these corporations or persons since August 17, 1936, when he, in disgust over the policies of the management, sent in his written resignation which is set

forth in full in the footnotes to page 10 of said appellees' brief. *It is admitted, however, that on August 20, 1942, he was a creditor and stockholder of the Holding Company and of Pacific Empire Corporation.* Defendants Maffei and Arnold also admit that on numerous occasions Mr. Scampini had inquired of them the nature of the transaction had between them and defendant Peter Bercut on January 8, 1941, and they further admit that they had falsified to him, Mr. Scampini, as well as to the other creditors, the nature of said transaction. (See R. 894.) Director Webb Richards testified, at R. 642, that the first time he learned of the true nature of said transaction was around August 20, 1942, when he learned of it from Mr. Scampini, who in turn had been told by the defendants Maffei and Arnold.

Is it to be wondered that under such circumstances Mr. Scampini (R. 642) advised the directors of the company to consent to the appointment of a receiver? Would he have been discharging his duties as a lawyer had he, under the circumstances made known to him, advised them to oppose the appointment of a receiver or to cover up on the obvious insolvency of the company and on their own mismanagement?

These directors, as well as defendants Maffei and Arnold, were told that upon the appointment of a receiver, suit would be brought against all persons responsible for the recovery of any assets belonging in law or in equity to the company, and director Webb Richards at R. 643 testified he consented to the appointment of a receiver because, in his opinion,

as a director of the company, the company needed a receiver and also because he felt that whatever the rights of the company had against Peter Bercut *and others* should be prosecuted.

The procedure, followed in this case, for the appointment of plaintiff as receiver of the Holding Company was entirely proper and not unusual. (See 45 American Juris. on Receivers, page 101, Sec. 119 and Sec. 125, page 106.)

Upon the appointment of the receiver, and after a full investigation of all the facts, and the taking of Mr. Arnold's deposition, it became apparent that defendants Maffei and Arnold were just as responsible as defendant Peter Bercut for the loss to the Holding Company of its holdings in Merchants Ice and Cold Storage Company, and, because of this, neither the receiver nor any of his attorneys hesitated one moment to sue them and to prosecute said suit against them without restraint and to the same extent as it has been and is being prosecuted against the defendant Peter Bercut. Throughout the proceeding no favoritism has been shown and no protection has been given or promised.

The argument made by counsel for appellees Peter Bercut and Henri Bercut on this phase of their brief constitutes an indirect attack on the propriety of the appointment by the Chancery Court of the State of Delaware of plaintiff herein as receiver for Pacific Empire Holdings, Inc. In the answer filed in this cause by said appellees—the lack of capacity of

plaintiff to sue or prosecute this cause was pleaded as a special defense. (See R. 38.) In the course of the trial plaintiff and his attorney, Mr. Ivan Culbertson, were present in Court prepared to defend such capacity, but said appellees (R. 294) chose to withdraw this special plea and the trial Court, with full knowledge of all the facts and circumstances leading to his appointment, in its Finding II (R. 941), found that plaintiff was the duly appointed, qualified and acting receiver in equity for Pacific Empire Holdings, Inc.

In view of these facts and the record it ill behooves the defendant Peter Bercut to now reflect upon the propriety of the appointment of plaintiff as receiver of Pacific Empire Holdings, Inc., especially so when said receiver and his attorneys are guilty of nothing more than bringing to the attention of the proper Court all of the facts and circumstances surrounding the transaction of January 8, 1941, to the end and purpose that justice be done to all persons concerned.

It is respectfully submitted that any other conduct on the part of the receiver and his attorneys would be a dereliction of their duties to the creditors of these corporations and to their more than eight thousand stockholders. (See again 45 Am. Juris.—on Receivers, Sec. 130 and 131, pages 110 and 111 of same.)

REPLY TO APPELLEES' POINT (d).

THE PRICE PAID FOR THE SHARES OF MERCHANTS ICE DELIVERED TO BERCUT BY MAFFEI AND ARNOLD WAS SHOCKINGLY INADEQUATE.

The finding of the trial Court as to the value of the shares transferred to Peter Bercut by Maffei and Arnold is treated by the appellees as "the end of the argument" and appellant is accused of lack of candor in attacking the finding.

We frankly state that the adoption by the trial Court of the finding proposed by appellee with reference to the value of the shares of stock in question, is the most astounding and incomprehensible fact in the entire record.

There is an old saying to the effect that figures don't lie, which is particularly apropos of appellees' argument on the subject of value. Not that we intend to impute lack of veracity to the appellees, but we do wish to point out the distortion which results from their one-sided analysis of figures.

Appellees' first argument consists of a vigorous attack upon the testimony of Will F. Morrish, the only really competent and disinterested witness on this phase of the case. By quotation of selected portions of testimony of Mr. Morrish on cross-examination the appellees have insinuated the thought that Mr. Morrish was unaware of the priorities of the preferred stock in liquidation and of the arrearage in dividends on cumulative preferred stock, by reason of which the calculations of Mr. Morrish were erroneous.

We do not wish to encumber the record with a lengthy quotation from the testimony of Mr. Morrish, but we call the attention of this Court to pages 479 to 482 of the reporter's transcript where Mr. Morrish stated upon cross-examination that he based his opinion upon the liquidating value; that he had, in his calculations, eliminated over \$450,000.00 from the assets of the company, in addition to which he also considered the long period of service of the company in the community and the very substantial value placed on the control of the corporation which was vested in the stock under discussion.

The witness was a banker and financier of years of experience and he very clearly indicated that he was talking not arithmetic, but practical banking and business and that his opinion of value was in the light of what would reasonably be expected to happen and not a legal analysis based upon the interpretation of legal rights.

Appellees' brief contains a summary of the testimony of their witnesses relating to the market on Merchants Ice stock. (pp. 23-24.)

That market quotations under the circumstances proven to have existed in this case are no criterion in determining the true reasonable value of the 12,495 shares of preferred and 65,863 shares of common stock turned over to Peter Bercut is clearly shown by the testimony of H. R. Baker, an investment broker and specialist called as a witness by the plaintiff. At pages 444-445 of the record he testified as follows:

“Q. From your experience in unlisted securities are you in a position to state whether or not when a majority of the stock is owned by a concern and there are occasional sales transactions on outstanding stock, whether the market for such stock and such transactions reflect the true reasonable value of those securities?

A. Not necessarily. It all depends on where the control is and what kind of a control it is and what they are doing for the outside stockholders.

Q. Where a situation exists that the transactions are very rare and only involve a small number of shares, and the purchasing power, as it were, is limited to the controlling interest, would the price at which such securities would occasionally be sold be a true reflection of the reasonable value?

A. I would say they would have no reflection on the reasonable value, unless the parties who were making the market wanted to make it such.”

The appellees have made a series of balance sheet adjustments, overlooking the ultimate conclusion at which they must arrive. They start at the point where Will F. Morrish left off. They ignore the fact that Mr. Morrish already made arbitrary adjustments totaling \$536,988.53 for the specific purpose of accomplishing the same result the appellees are endeavoring to accomplish, namely, to wring out any water and arrive at a knock-down price. In other words, examining the résumé of Mr. Morrish's figures, Defendant's Exhibit E (p. 471), we see that Mr. Morrish

arbitrarily and to cover possible overstatements of assets or understatement of liabilities made the following eliminations:

Item	Books	Morrish	Elimination
Land	*865,608.55	\$700,000.00	\$165,608.55
Buildings	1,003,302.97	750,000.00	253,302.97
Investments	26,437.40	—	26,437.40
Due from Globe	23,874.94	—	23,874.94
Def. charges	59,772.95	—	59,772.25
			<hr/> \$536,988.53

*Obvious misprint in transcript written \$86,508.55.

The appellees then stress the testimony of Mr. Samuels, who by adjustment of the land account alone eliminated an additional \$541,125.00.

Appellees then consider the testimony of W. G. Evans, who eliminated an additional \$58,218.00 from the notes and accounts receivable.

If we follow appellees' argument to its logical and unavoidable conclusion we arrive at a net impairment of capital of \$1,492,235.00. This conclusion is so ridiculous it must fall of its own weight. If we become ridiculous we lose credibility, and the argument of the appellees followed to logical conclusion, becomes ridiculous. We are not dealing here with some little private company circulating its balance sheet among a few stockholders and its bank. It is a public utility subject to the jurisdiction of the State Railroad Commission, having a history of over fifty years' operation. The balance sheet and statements of assets included in this record are also filed with that Commission and it is on the basis of the established and accepted value

of these assets that the rates of the corporation are set by law. The corporation on January 8, 1941 had a capital structure of \$1,415,725.00, consisting of \$416,-150.00 seven percent preferred stock and no par common stock having a stated value of \$999,575.00, and according to certified audits referred to herein and according to the balance sheets prepared by appellees, a deficit of less than \$225,000.00. With one fell swoop to write nearly \$1,500,000.00 off the books upon the assumption that if the property was knocked down piecemeal to individual purchasers it would bring less than book value, is contrary to accepted business practice. The fundamental precept of all valuations of active businesses is that they should be appraised on a *going concern basis*.

Now, on the other hand, let us examine into the facts as supported by the record.

There were introduced in evidence certified balance sheets prepared after audit by Haskins & Sells and John F. Forbes. Let us just see what Mr. Forbes says about the values (p. 522):

“Plant, Property and Equipment—The plant property and equipment are recorded on the books at the September 1, 1927, valuation determined by The American Appraisal Company, plus subsequent additions at cost and less retirements at book valuation.

Land—\$865,608.55.

Recording the land, site of the company's plant, at the September 1, 1927, appraised valuation thereof, \$865,300, resulted in a write-up of \$148,-

775.26, which latter amount is shown as surplus arising from appreciation."

Now it is obvious that the foregoing simply means that on appraisal in 1927 the American Appraisal Co. appraised the land for \$148,775.26 more than cost. So the land which Mr. Samuels so casually appraises for \$158,100 actually cost some \$715,000.00. Such a stupendous overpayment cannot be conceived, much less explained. Furthermore, we would certainly expect some comment from accountants of such standing, if such an outrageous condition existed, but we find none. Nor do we find any refusal on the part of the Railroad Commission of California to accept said valuation as the basis of determining the rates to be charged by the company for its services.

Do appellees consider the fact that Mr. Morrish already made arbitrary provision of over \$536,000 to cover any over-valuations or fluctuations, which would include, among other things, a fluctuation in land value. Oh no, they nonchalantly duplicate Mr. Morrish's adjustment by taking Mr. Samuel's in addition thereto.

Let us consider here the Evans adjustment of accounts receivable. Appellees vehemently deny the Bercut sale rendered his vendor insolvent. Why then the charge-off of the vendor's account receivable? Here they are blowing hot and cold. If appellant was solvent, the account was good—if appellant was not solvent the charge-off was justified. The answer, of course, is that the account was good as long as appellant had the stock of Merchants Ice as an asset

and only so long. The write-off was justified after the Bercut sale *and because of it*.

The next item in the receivables is slightly more difficult to explain, at least for appellant. We think if candor is desired, Peter Bercut could explain why he bought \$5000.00 worth of stock of Frostkraft, at the same time the Merchants wrote the Frostkraft account off the books as uncollectible. (p. 441.) Or did they? Mr. Collins of Frostkraft didn't seem to know about it. (p. 440.)

“Q. How is that indebtedness today?

A. Well it improved. I will put it this way: That last year we were able to keep up our current bill, and of course, we still owe for previous years freezing, part of the bill.”

Finally, Mr. Evans and appellees' brief make no reference to the \$26,500.00 reserve for bad accounts and the \$15,000.00 reserve for contingencies which were ample provision for bad accounts if the Holding Company account was good, which it was prior to the Bercut deal.

Finally, since candor is due the Court, let us examine the comparative balance sheets at December 31, 1940, and December 31, 1941. (p. 371, Pl. Ex. 32.) This is the balance sheet prepared at the end of the first year of Bercut control. Where are any of the adjustments so vehemently argued in appellees' brief? Let us examine Exhibit for Plaintiff No. 33 (p. 374), being the balance sheet at the end of 1942, and still we find no such adjustment. How can the publication of those balance sheets be reconciled with the

claims of the appellees with respect to the necessity of such adjustments? Either the present management of Merchants Ice is misrepresenting facts or appellant's contentions are justified.

According to the balance sheet prepared for Peter Bercut at the end of 1941 (p. 371) the common stock at December 31, 1940, had an equity in substantial assets of \$782,982.50 or \$7.30 per share. If provisions for dividend arrearage on the outstanding preferred stock be made, the equity behind the common stock is reduced to about \$3.25 per share, on which basis, of course, the preferred stock increases in value to \$20.00 per share. In other words, according to the statement prepared by the Bercut management, the stock Bercut received from Maffei and Arnold had a book value at December 31, 1940, before provision for dividends in arrears, as follows:

12,495 shares	preferred at \$10.00	\$124,950.00
65,683 "	common at 7.30	480,799.90

after providing for preferred dividends in arrears:

12,495 shares	preferred at \$20.00	\$249,900.00
65,683 "	common at 3.20	214,054.75

Assuming, without conceding, some adjustment should be made because of possible overstatement of assets or understatement of liabilities, the adjustment in total never could equal an amount sufficient to cause the Holding Company's equity ratio of the adjustment to reduce the value of its holdings to the ridiculous sum of \$35,000.00. The failure of the trial Court to consider these incontrovertible facts is an obvious mistake of fact.

Finally, we come to that most candid witness, Mr. Louis T. Samuels, "a real estate expert" (R. 643) upon whose testimony, it appears, the appellees lay so much stress for justifying the Court's finding of value.

Mr. Samuels' task was simple. He came to Court with the preconceived intent of testifying to a value of \$1.00 per square foot for the property of Merchants Ice. Let us consider some additional facts. Here is the largest single parcel of private property on the San Francisco Embarcadero. Unexcelled spur track and shipping facilities, both indispensable to a cold storage plant; over three acres of ground space, occupied with specialty buildings adapted to their particular requirements; a going concern in existence for fifty years. To what does Mr. Samuels compare this consolidated operating unit? Principally to spur track property and government storage property located not down by the Merchants Ice plant, but over by Fisherman's Wharf where the government has engaged in great activity since the war. Examination of the parcels used for comparison (R. p. 660) clearly shows these facts. With only two parcels is Mr. Samuels familiar. One, with a 68-foot frontage, with a sixty-year-old building (and according to his testimony (p. 660) such a building is valueless) he sold to his brother for \$10,000.00, or \$145.00 a front foot. The Merchants Ice property has over 2200 feet of street frontage. (See Ex. M, p. 657.) The other property (R. 668-669) he calls a block. It had 500 feet of street frontage with 17,000 square feet of land,

improved with a cracked and obsolete building. He sold it for \$14,500.00, or \$290.00 a front foot. On cross-examination, he reveals that the property produced about \$1500.00 a year gross income after taxes, but before insurance, maintenance, depreciation, etc. Although Mr. Samuels calls it a block it is really only a large lot approximately 130 x 130 and obviously it sold on an income basis of about 10% a year gross after taxes.

Mr. Samuels entirely ignores the plottage value of owning a single unit covering nearly three blocks improved with buildings adopted to the business. Having determined on \$1.00 per foot he sticks to it through thick and thin. Yet if we consult Mr. Samuels' summary (pp. 657, 658) we find he is not unaware of going concern value, because, although in his analysis on pages 659 and 660 he considers items 2, 3, 5, 7 and 8 obsolete and almost valueless, he nevertheless appraises the improvements on those parcels for \$153,000.00.

But the outstanding reflection upon the unreliability of Mr. Samuels, the paid witness of the appellees, is best shown by his conduct with respect to the photographs taken by him of some of the buildings and improvements of Merchants Ice, which photographs he brought with him to Court and exhibited them to the trial judge. At page 647 of the record, he testified as follows:

"Q. By the way, you also had some photographs of some parts of the property taken, haven't you?

A. I had some photographs taken only of those that are in bad condition and showing what I am stressing. I did not have any photographs taken of this one."

And at pages 664-666 he gave the following testimony:

"Mr. Scampini. Q. Mr. Samuels, you brought some photographs here into the court. Who took those photographs?

A. Moulin is the name—Gabriel Moulin.

Q. Did you take any of the pictures yourself?

A. No.

Q. Were you there when they were taken?

A. Yes, I went with the photographer.

Q. Did you go around looking for cracks to photograph?

A. Definitely, yes.

Q. Did you go around looking at all of the buildings?

A. We went over all the buildings.

Q. Now, there are two six-story buildings on this property, aren't there?

A. Surely.

Q. You only brought pictures of one. Where is the other?

A. The other is in excellent condition.

Q. *You just took a picture of the building that looked dilapidated; is that right?*

A. Yes.

Q. Now, the one that is in excellent condition is located on this piece of land designated as lots 11, 12 and 14 of the American Appraisal Company; is that correct?

A. I don't know the numbers.

Q. The particular photograph of that building you did not take?

A. No.

Q. This is the one that was built with the bond issue?

A. I don't know anything about it.

Q. This is the building that is the most modern building of the lot?

A. This is the building I said was in excellent condition."

Remembering that the burden of establishing that adequate consideration was paid and that the transaction was fair in every respect, rested, in this case, upon the appellees, the acceptance by the trial Court of the testimony of Mr. Samuels as the criterion of value of Merchants Ice, in view of the unprejudiced and scientific valuations made by Mr. Morrish, the certified public accountants, the American Appraisal Company, the undisputed elements of costs, of going concern value, of control, causes us to repeat our opening premise: namely that the finding of the trial Court, in this phase of the case, constitutes the most glaring and astounding error in the whole record.

REPLY TO APPELLEES' POINT (e).

PETER BERGUT WAS A FIDUCIARY.

Appellees' point (e) in the Statement of Facts that "Peter Bergut was not a director at the time of the deal" is contrary to the evidence. (R. 262 and 267.) Witness Bergut says he wasn't after May 1, 1940, but the undisputed evidence of a disinterested party, to wit, witness Leona Keener, is that he was, until his resignation was dictated to her by Bergut

on January 29, 1941, and was dated back to March 31, 1940. (R. 674-681.) To get around this damning evidence, the witness Bercut says he orally resigned in May, 1940, but on January 29, 1941 (after the "deal" had been closed) he wanted it in writing. (R. 320-21. Testimony of Peter Bercut):

"Q. Your accountant told you to resign?

A. Yes.

* * * * *

Q. When did you (resign)?

A. When we started to deal on this, I told Mr. Arnold that I would like to have my resignation in writing.

Q. You mean that you told Mr. Arnold that you would like to submit your resignation in writing?

A. No, I wanted to resign, but I wanted everything in writing."

If he was so certain of his previous resignation and it was a fact, no further act was necessary. Let us examine the circumstances existing at the time the urge developed "to have it all in writing". He (Bercut) is about to close a deal with his fellow members on the executive committee to clean out the last remaining sound asset of the Pacific Empire Holdings Inc. of which he was second vice president and on whose board of directors and executive committee he sat as a part of its management. In addition he was its representative on the board of directors of Merchants Ice & Cold Storage Co. and had thereby acquired an intimate knowledge of all of its affairs. The price was to be the paltry sum of \$35,000, of which \$25,000 was

to be used to liquidate an indebtedness of that amount owed by the selling corporation to Merchants Ice & Cold Storage Co., and \$6000 of which was to be paid to the Pacific National Bank. (R. 225.) Perhaps the enormity of the "deal", perhaps some inkling of possible suits, perhaps distrust of his fellow conspirators, occurred to him or his accountant and promoted this elaborate scheme to divest himself of his obligations, fiduciary duties and trust to the corporation and the stockholders he was about to betray.

Behind this cloak of alleged oral resignation he now seeks to hide, so as to escape a violent breach of trust on his part.

But it is not even a cloak. It is rather a transparent veil.

The question here is simply, was Peter Bercut a bona fide purchaser for value, without knowledge of the condition and affairs of these companies and of the value of the assets he was buying? Was he dealing at arm's length with the Pacific Empire Holdings Inc.?

The evidence produced at the trial of this case and in the depositions taken therein indisputably prove to the contrary. It shows that Peter Bercut sat on the board of directors of Merchants Ice & Cold Storage Co., as the representative and agent of Pacific Empire Holdings, Inc., the parent company, and as such he owed a fiduciary duty to his principal to protect its interests. This law of agency and strict accountability applies whether we concede, which we do not, that he was not a director of Pacific Em-

pire Holdings, Inc. at the time of the deal. As such agent he was dealing with his principal through its other two representatives seeking to dispose of all of the corporation assets without board meetings or authorization and without knowledge of its board. He was consummating this deal with and through his actual, or if you will, his former associates on the executive committee, and with (whose past course of conduct as well as mental processes he was quite familiar. He admits he was thoroughly familiar with Merchants Ice & Cold Storage Co.; had received its financial statements and knew its problems—but would do nothing while a director to assist it or secure new accounts for it or accept the management and presidency, unless he had control represented by ownership. By his own words he discloses his motive—selfish interest. Like the robber barons of old he watched these corporations being looted by their officers Maffei and Arnold, passively if not actively aiding them therein, ready to pounce upon them just as soon as it was obvious they no longer had the means to meet the inevitable demands upon them.

And what do the appellees claim, as a justification for the “deal”, the situation to be in December, 1940, when the negotiations commenced and on January 8, 1941, when the “deal” was closed and agent Peter Bercut owned a million-dollar concern whose existence dated back to 1890, occupying approximately three square blocks on the Embarcadero, of San Francisco, for \$35,000.00? (R. 293-303.) The following are the outstanding factors which, they assert,

factually justify the necessity and fairness of the transaction:

1. Loss after depreciation for past ten years of \$291,000.00. (R. 420.)
2. Insufficient cash to meet payroll. (R. 296.)
3. No further credit. (R. 296.)
4. Unpaid obligation due P. G. & E. for electricity. (R. 297.)
5. Semi-annual interest payment on bonds, \$21,000.00, due April, 1941. (R. 298.)
6. Ice contract with City Ice Delivery Co. pledged. (R. 299.)
7. City and county taxes due. (R. 301.)
8. Bank of America butter claim. (R. 303-305.)

This was supposed to be the situation with reference to Merchants Ice & Cold Storage Co. under the management of Pacific Empire Holdings, Inc., which in turn controlled Merchants Ice, and itself was managed by the aforesaid three.

Although these alleged conditions are the basis upon which the appellees attempt to justify the finding of the Court to the effect that Merchants Ice was, on January 8, 1941, insolvent, that they in fact did not exist is proved by the fact that to restore the corporation to solvency and profit all that was actually required was:

1. A loan of \$18,000.00 in 1942.
2. Collection of \$25,000.00 owed by Pacific Empire Holdings.
3. New management.

Fundamentally the problem was lack of confidence in the management, analyzing all of Bercut's testimony, and Bercut was admittedly a participant in the management of Merchants Ice.

Now as to Pacific Empire Holdings, Inc. we find after a ten-year management of that concern by Messrs. Maffei, Arnold and Bercut, in the various capacities set forth, that it has nothing left as of the commencement of the negotiations looking toward acquisition of Merchants Ice & Cold Storage control by director Bercut, except that stock which is the subject matter of the "deal". In addition there was a judgment against the holding company in the amount of \$11,942.80 obtained by the United States Government in November, 1940, as well as other liabilities, which were pressing.

REPLY TO APPELLEES' POINT (f).

**IT MAKES NO DIFFERENCE WHO OPENED THE
NEGOTIATIONS.**

Does it make any difference who initiated the negotiations looking toward the perpetration of a fraud? Obviously Arnold and Maffei were at their wit's end, for had they now finally come to the point where they must disclose all their mal-administration or else find a friendly source who was familiar with all their activities and with whom they might make a deal without too many questions being asked and from whom they might expect protection? Who more likely than their fellow director, co-member of the executive committee, the only one familiar with their entire career

and all of their operations, and with sufficient money to handle it? The answer to their prayer was Peter Bercut. They were on the spot and he was their solution. He knew it and he drove a hard bargain in his desire to acquire control of Merchants Ice & Cold Storage Co., for as "cheap a price as possible" (R. 342), a natural adjunct to his other varied businesses. He completely forgot his duty to his principal, and his fiduciary obligations as director, executive committee man and voting trustee.

Even though the corporation was being liquidated, as the witness Bercut says, or perhaps dead, as he indicated, does it thereby lose all right to protection? Is the corpse to be rendered and torn by its own officers and directors and divided among them with impunity?

And appellees would have this Court believe that because the final act was initiated by Arnold and Maffei that whatever Peter Bercut did thereafter was excused, that his position, past and present, with these companies, should be disregarded.

II.

ARGUMENT.

The case comes to this tribunal on appeal under Rules of Civil Procedure (52 (a)) for a review of the entire case, both law and fact and on a statement of findings of fact and conclusions of law which are not only contrary to fact and evidence, as appellant has shown herein and in its opening brief, but also contrary to the law applicable thereto.

A. RESIGNATION OF DIRECTORS.

It may be conceded that in the absence of a statutory or by-law provision, that a director may resign and that such resignation may be oral, although the usual and more orderly procedure is for it to be in writing. Whatever method is adopted it must clearly show *an intent to resign*. Oral declarations do not constitute a resignation where ambiguous and where subsequent acts and declarations are entirely inconsistent with any intention to resign. Neither is loose and ambiguous language sufficient to prove a resignation.

Union National Bank of Troy v. Scott, 66 N. Y. S. 145.

Although a director may resign at any time, subject of course to a charter or statutory provision to the contrary or to which he has assented by becoming such director, he may not fraudulently resign or in an attempt to effectuate a fraud.

Evarts v. Killingworth Mfg. Co., 20 Conn. 447 at 457.

Section 4 of Article IV of the by-laws of Pacific Empire Holdings. Inc., requires that the resignation be duly accepted. (R. 74p.) In the absence of charter or statutory provisions to the contrary, as in the instant case, the resignation of a director becomes complete the moment the resignation is made to the *proper officer or body*, which is usually the officer or body which appointed him and it is not necessary that the resignation be accepted, or that it be entered in the corporate minutes. It, however, must be *com-*

municated to the *proper body* and there must be an evidenced intention to resign.

Plaintiff and appellant contends that it is immaterial when Bercut attempted to resign, because of (1) his inextricable connections with all of the companies; (2) his continuance as director on the board of directors of Merchants Ice & Cold Storage Co., to which he owed his election as a result of the control of the Merchants Ice by Pacific Empire Holdings, Inc.; (3) his continuance on the board of directors of Pacific National Bank of San Francisco as the representative of Pacific Empire Corporation, in turn controlled by Pacific Empire Holdings, Inc.; (4) his continuance as a proxy for shares of Pacific Empire Corporation with Maffei and Arnold after May 1, 1940, the alleged date of the oral resignation, which gave him, along with Maffei and Arnold, control of that company; (5) his continuance after said date May 1, 1940, as voting trustee of the shares of stock of Pacific Empire Holdings, Inc., the selling corporation in this "deal".

The questions concerning this point to be determined by this Court are:

(1) Did Bercut effectively resign as director at any time prior to January 8, 1941, the date of consummation of the "deal"?

And

(2) Did that make any difference, in view of his position in relation to all these companies and his continuing to serve as a representative of the sell-

ing company on the board of Merchants Ice along with Maffei and Arnold?

The cases cited by appellees under points 1 and 3 on pages 49 to 53 inclusive, which, stating general law, are incomplete in so far as they do not even remotely touch upon Delaware law and do not fit the situation here where a charter (by-law) provision is involved. Resignations involve the internal affairs of a corporation and are governed by the laws of the State of incorporation, and consequently California cases are not applicable.

Appellees' conclusion on page 53 of their brief is that because a director may resign if notice is properly given and adequately proven, and not for fraudulent purposes, therefore the "deal" of January 8, 1941, was one between the *corporation* and a *stranger, at arm's length*.

His support for this unwarranted conclusion is his own finding to that effect, which is merely chasing one's tail.

He neglects, or wilfully overlooks the situation existing in the instant case, the fiduciary relationship existing for ten years between Bercut, Arnold and Maffei in connection with these companies, the inter-connecting directorates, the elaborate system of control through proxies and voting trusts; the closely allied and absolute control of management through the executive committee; and lastly, the completely overlooked and disregarded factor of trustee—*cestui que* trustee—principal and agent—relationship of

Bercut as director with Maffei and Arnold on the Merchants Ice, at the will of Pacific Empire Holdings, Inc., which they controlled as leading directors and managed as its executive committee. To have destroyed this fiduciary relationship, Bercut would have had to resign from the board of Merchants Ice as well as from all other connections with any and all of these companies, in all capacities. This he did not do and defendants have not even contended that he did.

B. DIRECTORS' DUTIES AND FIDUCIARY RELATIONSHIP.

“Directors shall exercise their powers in good faith, and with a view to the interests of the corporation.”

Civil Code of California, Section 311 (General Corp. Law).

A director of a corporation occupies a fiduciary relation to it and its stockholders. His position is one of trust and he is frequently denominated a trustee and so held accountable in equity. The ordinary trust relationship of directors of a corporation and stockholders is not a matter of statutory or technical law. It springs upon the fact that directors have the control and guidance of corporate business affairs and property and hence of the property interests of the stockholders. Equity recognizes that stockholders are the proprietors of the corporate interest and are ultimately the only beneficiaries thereof. Those interests are in virtue of the law in trust

through the corporation to the directors and from that condition arises the trusteeship of the directors with the concomitant fiduciary relationship.

Italo Petroleum Corp. of Amer. v. Hannigan,
14 A. (2d) 401 (Del. 1940);

Ashman v. Miller, 101 Fed. (2d) 85 (C. C. A.
6th Cir. 1939);

Dunnett v. Arn, 71 Fed. (2d) 913 (C. C. A.
10th Cir. 1934).

Directors are called upon in disposing of the property of the corporation to obtain prices which are for the best interests of the corporation and its stockholders.

Bodell v. General Gas & Electric Corp., 15 Del.
Ch. 119, 132 Atl. 442.

And directors are not only bound not to profit personally at the expense of the corporation or its stockholders, but they must save them from loss. *Idem*; and stockholders are entitled to assume that directors will be faithful to their trust.

Henderson v. Plymouth Oil Co., 16 Del. Ch.
347, 141 Atl. 197 (1928).

And the control which a block of corporation's shares carries with it is a factor to be considered in determining whether the price received therefor was a fair price. (See *Potter v. Sanitary Co. of America* (Del. Ch. 1937), 194 Atl. 87.)

And even a fair price does not justify corporate officers in making a sale if the purpose and effect thereof is to advantage themselves, either in power

or profit, to the disadvantage of the corporation they represent. (*Idem.*)

And where a director is placed on the board as a representative of another corporation as Bercut was placed on the board of Merchants Ice by Pacific Empire Holdings, Inc., to safeguard its main asset, in fact its sole asset, he is bound to act in *good faith* toward *both* corporations.

Atlantic Refining Co. v. Hodgeman, 13 Fed. (2d) 781, C. C. A. 3rd Cir. 1926.

C. DIRECTORS REPRESENTING TWO CORPORATIONS.

It has also been held that transactions between corporations having common officers and directors are *presumptively fraudulent* unless ratified by the stockholders. In the case before this Court, the controlling directors of Pacific Empire Holdings, Inc. and its executive committee, Messrs. Maffei, Arnold and Bercut, respectively its president, executive vice president and second vice president, are likewise the controlling directors of Merchants Ice and its vice president, president and director respectively. The Merchants Ice had a board of directors of five consisting of Maffei, Arnold, Bercut, Morrish and A. A. Herr. The latter was a bookkeeper employee of all the corporations involved and in which the "Big Three" dominated and controlled.

Where the same persons are directors and managers of two corporations as in the case at bar, their

dealings *interesse* are subject to close scrutiny and where the transaction is of advantage to one corporation and the directors or director personally and disadvantageous to the other corporation, it is voidable in a suit brought by stockholders.

Potter v. Sanitary Co. of America, 194 A. 87 (Del. Ch. 1937);

Cahall v. Lofland, 114 A. 224 (Del. Ch. 1921).

And where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness and where a sale is involved, the full adequacy of the consideration.

First Trust & Savings Bank v. Iowa-Wisconsin Bridge Co., 98 Fed. (2d) 416 (C. C. A. 8th, 1938).

D. DIRECTORS—DEALINGS WITH CORPORATION.

Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. Although technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. In fact a public policy, existing through the years, and no doubt derived from a profound appreciation of human characteristics, frailties and motives, has established a restatement of the old Biblical rule (that one may not serve two masters), by demanding of a corporate officer or director, or agent or proxy or voting trustee, peremptorily and inexorably, the most scrupulous ob-

servance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage or of its assets at grossly inadequate values. Such a rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self interest. In this case before this Court, we have duty kicked overboard and self interest in full control and attempted to be justified upon a theory of a course of past conduct on the part of his associates Maffei and Arnold, the other two members of the controlling triumvirate. While the occasions for the determination of *honesty*, *good faith* and *loyal conduct* may be many and varied and no hard and fast rule can be laid down, can it be said with a clear conscience that any element of honesty, good faith and loyal conduct, by whatever standard measured, is present in this case?

For a measure of such standards of loyalty required, see *Guth v. Loft Inc.*, 5 A. (2d) 503 (Del. Ch. 1939), already covered at length in appellant's and plaintiff's opening brief. We must keep in mind that the board in addition to the "triumvirate" consisted of A. A. Herr, a bookkeeper employee, T. M. Ryerson, a manager employee of a wholly owned subsidiary, California Pacific Service Inc. operating a laundry in Fresno, where he resided, Luigi Giachinni, a farmer living out of the city, and Webb Richards,

employee of an Oakland stock brokerage concern. Had such a board so constituted ratified the act it would have been illegal.

E. DIRECTORS—MISMANAGEMENT BY.

Directors are personally liable for gross inattention and negligence permitting fraud or misconduct on the part of agents, officers, co-directors under their control, which could have been prevented if they had given ordinary care and attention to their duties.

McGinnis v. Corporation Funding & Finance Co., 8 Fed. (2d) 532.

It is submitted that the trial Court in exonerating Maffei and Arnold along with Bercut completely disregarded the law and the fact and sanctioned the most colossal piece of corporate mismanagement and fraud that has been perpetrated in the west. An investment in excess of \$2,500,000.00 made by ten thousand stockholders is dissipated over a ten-years' management and control by Maffei, Arnold and Bercut voting together and acting together as a fixed unit in all matters concerning that company.

To allow this decision to stand is to place a premium on corporate mismanagement and directors' dishonesty and disloyalty.

The right to sue officers and directors for mismanagement such as is evident in this case resulting in insolvency and a receivership is in the corporation

and may be enforced by the receiver for the benefit of all persons interested in the estate.

duPont v. Standard Arms Co., 9 Del. Ch. 324,
82 A. 692.

**F. THE TRANSACTION IN ISSUE WAS NOT A
CORPORATE ACT.**

In their point 8, appellees contend in brief that having secured a favorable finding drafted by them to the effect that "Maffei and Arnold were acting within the course and scope of their authority" predicated upon ten years of unchallenged management, the sale was legally binding on the corporation. Appellees then cite a number of cases purporting to support exercise of management by user, so to speak. An examination of these authorities clearly shows that none of them are applicable to the case on appeal, for none of them stand for the principle that repetition of an act in violation of statute constitutes an abrogation of that statute or an estoppel against a receiver seeking to recover for the corporation or set aside acts so done. Neither do they announce the principle that a course of wrongdoing, or of fraudulent acts, justifies a perpetuation of such wrongdoing or fraud. To concede such a principle is to state that, so long as it goes unchallenged or is undetected, a course of conduct in corporate management contrary to law and a series of fraudulent acts makes those acts in accord with law and permits their continua-

tion as a matter of right. Such a position results in an absurdity and should merit little attention.

The case of *Joseph Greenspon's Sons v. Pecos Valley Gas Co.*, 156 Atl. 350, so heavily relied upon by appellees, merely states that where a president (not the first vice president) has been in the habit of doing lawful and proper acts for a corporation, and the company had authorized him to so act and had recognized, approved and ratified his former and similar actions, he is presumed to have such authority. It is conceded that usual employment may be evidence of the powers of an agent, and that a responsibility will be laid upon the principal for the acts of his agent done within the actual or *apparent scope of his authority*; that it is a doctrine which has come to apply to corporations as well as individuals and with the same qualifications and limitations. It must be within his ostensible authority and the laws of agency in this respect govern. It never justifies the doing of an unlawful act, a fraudulent act, an act outside ostensible authority, a disloyal act, a dishonest act or an undisclosed act for the agent's benefit resulting in a secret profit to himself and a detriment to his principal. (In this case Pacific Empire Holdings Inc.)

It must be an act in the usual course of business to be within the scope of his ostensible authority and it must be for the benefit of his principal and if not it must be lawfully ratified by him. The Delaware

law forbids the ratification of fraudulent or wrongful acts by stockholders and directors.

Guth v. Loft Inc., 5 Atl. (2d) 503 (Del. Ch. 1939).

Even a corporation organized to deal in securities may not be plundered or have the assets dissipated by its management under a so-called ostensible authority or course of conduct theory to the effect that one wrong piled upon another wrong created a right to continue piling wrong upon wrong. It is so apparent that ten years of mismanagement, even in a company organized to deal in securities, can not be said to be good management, proper management, loyal and honest management, that it seems unnecessary to comment further.

Appellees at pages 66 and 67 of their brief, give us the by-laws of Pacific Empire Holdings, Inc., relating to delegation of authority and Article VII concerning the executive committee, to the effect that action by the executive committee is subject to *immediate disaffirmance* by the board. He then points out that this wasn't done until twenty months later on August 20, 1942, and that such conduct is not immediate disaffirmance, if at all. The law does not require the performance of a useless act, and we have already pointed out in this brief that the board of directors at the time of the deal, January 8, 1941, elected February 15, 1940, consisted of:

- | | |
|---|---|
| 1. M. Maffei, President | } Executive Committee
and Management |
| 2. L. R. Arnold, Ex. V.P. | |
| 3. Peter Bercut, 2nd V.P. | |
| 4. A. A. Herr, Secy.-Treas., bookkeeper-employee | |
| 5. Webb Richards, Director, stock salesman | |
| 6. Luigi Giacchini, Director, farmer—never accepted
or present | |
| 7. T. M. Ryerson, Director—employee subsidiary | |

Even if this board had been notified of the details concerning this “deal”, constituted as it was, would it be reasonable to expect a disaffirmance when two of the board, Herr and Ryerson, owed the continuation of their jobs to the present management (Maffei, Arnold and Bercut) and the sixth director, Luigi Giacchini, never was called to any meeting. The last director, Webb Richards, had been interested with Arnold in trying to work out a stock or financing deal, wasn’t interested particular in management, and stated he never received *full details* on the “deal” until August 20, 1942.

To disaffirm one must have knowledge and until one has knowledge there is no capacity to disaffirm. The authorities cited by appellees on this point, their brief, pages 67, 70, are inapplicable here for they involve acts by an officer adopted through acquiescence of an uncontrolled board. Such was clearly not the case with Pacific Empire Holdings, Inc., where there was a board dominated by the defendants themselves.

Sale of assets of a Delaware corporation (Appellees’ Brief, pages 70-71), Section 65 (formerly 64a)

of the General Corporation Law of Delaware, provides that the directors may sell all of the assets, including good will, etc., when and as authorized by the affirmative vote of the holders of a majority of the issued and outstanding stock having voting power given at a stockholders' meeting *duly called for that purpose*, etc. Did we ever have such a stockholders' meeting called for that purpose? Of course not, even though voting control rested in the three, Maffei, Arnold and Bercut, as the proxies for the majority of outstanding voting stock. Delaware law does not permit a sale of all or substantially all corporate assets without compliance with Section 65 above noted. This deal involved substantially all, if not actually all, of the assets except the franchise of Pacific Empire Holdings, Inc., over which it had any control and in which it had any real equity.

Robinson v. Pittsburg Oil Refining Corp., 126 A. 46.

A Delaware corporation can sell assets incidental to the general transaction of its business without stockholders' approval, but not its principal assets.

Wattley v. National Drug Stores Corp., 204 N. Y. S. 254;

Greene v. Reconst. Fin. Corp., 100 Fed. (2d) 34 (C. C. A. 1st, 1938).

A Delaware corporation can only function through its board assembled in lawful meeting duly convened, and where there was neither a meeting of directors of a vendor corporation nor a resolution authorizing

a sale, it has been universally held there could be no sale; that the directors must act as a board, and not as individuals in order to bind the corporation; that neither a quorum nor a majority can act in any way other than through a duly convened meeting, and their individual consent to such a contract of sale of assets without a meeting is not the consent of the board.

U. S. Fire Apparatus Co. v. G. W. Baker Co.,
95 Atl. 294;

Kessel v. Murray, 196 N. W. 591;

Mattoax Leather Co. v. Patzowsky, 80 A. 241.

Appellees' point 8 (b), pages 72 to 76, has been covered in our answer under points ~~1, 2, 4 and 5~~ hereof. As stated by the case of *Pepper v. Litton* (308 U.S. at 306-307), "The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain." What are the "earmarks" of such a bargain? The mere finding of fact certainly can't be the "earmarks" to be sought, as is contended by appellees. We must go further than that and look for those earmarks upon which that astounding finding was made. A reading of the transcript of the record will not disclose them, as they do not in fact exist. If there ever was a deal conceived in fraud and born in iniquity this is it. As his innocent victim slept in confidence within his (Bercut's) arms, the deed was done. There were no arm's length transactions here—no strangers in this deal—rather the closest of inti-

(a) (f) an

mate relationships, entailing the strictest of fiduciary relations. None of the other cases cited by appellees have any bearing on the present case as this case is so obviously not an arm's length bargain.

Appellees' point 8 (c) has been already sufficiently covered by appellant's opening brief.

Appellees' point 9 has been sufficiently covered in our opening brief and this closing brief.

G. THE ARGUMENT THAT APPELLANT IS ESTOPPED BY REASON OF LACHES ON THE PART OF THE CORPORATION, ITS OFFICERS AND DIRECTORS.

At pages 56 to 61, inclusive, of their brief, the said appellees argue that because the defendants Maffei and Arnold sat back from January 8, 1941 to August 20, 1942, and permitted the defendant Peter Bercut to assume he had made a valid purchase and to build up the value of Merchants Ice, while the other directors of the corporation remained silent, the corporation and appellant, as its receiver, ought now to be held estopped from complaining. They argue, in substance, that the failure of Maffei, Arnold and the other directors to seasonably rescind the transaction before Bercut did a lot of work constitutes laches on their part, which are imputable to plaintiff.

In support of this most strange argument they cite *Twin Lick Oil Co. v. Marbury*, 91 U.S. 587, 23 L. Ed. 328; and *Alexander v. Phillips Petroleum Co.*, 9 Cir., 130 Fed. (2d) 533 at 595.

A glance at both of these cases is sufficient to demonstrate that they do not, at all, support the contention of the appellees. In the *Twin Lick v. Marbury* case the very portion of the opinion quoted by the appellees in support of their argument specifically includes the following condition, viz.: “* * * *after the party with whom the right is optional is aware of the facts which give him that option.*” Likewise in the *Alexander v. Phillips Petroleum* case, the portion of the opinion quoted by the appellees specifically states that “*Laches will not be imputed to one who has been justifiably ignorant of the facts creating his right or cause of action, and who, therefore, has failed to assert it.*”

Let us apply the permitted exception to the case at bar and what do we find? We find that the defendants Maffei and Arnold *told none of the directors the true facts of the transaction* and, as director, Webb Richards testified at page 642 of the record, the first time he learned of the true facts was about August 20, 1942, when he learned of them from Mr. Scampini. And director Webb Richards was called as a witness by the defendants for the purpose of proving that the directors knew of the transaction.

It is uncontradicted that no directors or executive committee or stockholders' meeting was ever called or held for the purpose of discussing or authorizing or passing upon the advisability of disposing of this principal asset of the corporation. It is admitted by the defendants Maffei and Arnold that *at no time have the stockholders of the corporation ever been*

told that the stock of *Merchants Ice* owned by their company had been sold. It is also uncontradicted that the true facts of the transaction were kept from inquiring stockholders, creditors and even directors, until on or about August 20, 1942, when the directors were, for the first time, told the true situation. It is also uncontradicted that in the interval between January, 1941, and August 20, 1942, defendants Maffei and Arnold continued to function as the managing heads of the corporation and never even bothered to call the directors together again or to hold any annual meetings of stockholders, or to send any report to the stockholders.

How, under such circumstances, it can be argued that the corporation had corporate knowledge of the transaction of January 8, 1941, and that it is now estopped from complaining because of the laches of these two men, is beyond our comprehension.

The unsoundness, in law as well as in good morals, of this argument of the appellees is clearly demonstrated by the opinion of St. Sure, District Judge, rendered in *Blum v. Fleishhacker*, 21 Fed. Supp. 527 at 533, where this phase of the law is fully discussed by him, and at page 534 that learned judge states:

"The evidence shows that discovery of the facts upon which the charges of fraud are based was made in 1933. The suit was filed on December 5, 1934, within the statutory period. The claim of laches is without merit. *Franklin v. Mortgage Guaranty & Security Co.* (C.C.A.) 57 Fed. (2d) 834, 838; *Victor Oil Co. v. Drum*, 184 Cal. 226, 242, 193 Pac. 243; *Kelley v. Boettcher* (C.C.A.) 85 Fed. 55, 62."

The same contention was made very forcibly in the case of *Loft, Inc. v. Guth*, 2 Atl. (2d) 225. After a lengthy discussion of the facts found by him bearing upon the argument (found at pages 242-245 of the opinion) the chancellor summarily brushed aside the plea of laches by stating (p. 245):

"I shall not review those cases. It is not necessary for me to do so for this, if for no other reason, that my conclusion is that *though some of the directors* knew that Guth was interested in Pepsi, none of them, excepting possibly Masters, who was treasurer, knew that Guth was drawing upon Loft for practically the entire financing of Pepsi. *If they did know it and authorized it, they were clearly breachers of the trust confided to their keeping.* Directors, who either through friendship for the president of a corporation, or for fear of his displeasure or for any other reason, authorize him to use the corporate resources committed to their management or control for the promotion of his own personal projects, are participants in a fraud. As they have no power to authorize fraudulent acts, so they are equally devoid of power to ratify them."

At page 67 of their brief the appellees advance the novel theory that because of the *inaction of the board of directors of the holding company* for a period of eighteen months (January 8, 1941 to August 20, 1942) they are to be *deemed to have adopted the unauthorized act of their president and secretary*. Boiling this argument down to its basic ingredient it amounts to a plea of estoppel by implied ratification. And the answer to the argument is that these directors, *admittedly kept in ignorance of the transaction,*

cannot logically be held to have adopted as an act of their own something of which they knew nothing about.

The case of *Roth v. Ahrensfield*, 27 N. E. (2d) 445 (Sup. Ct. of Illinois, 1940), cited by the appellees in support of their claim of *adoption* is clearly not in point because, as the Court there points out (page 447),

“When the corporation, through its disinterested officers or stockholders has been completely informed of the contract (in this case with its own president) over a long period of time and has not indicated its approval in any way, it may be concluded that the president’s action has been adopted.” (Citing cases.)

Clearly, the situation of the case at bar precludes the appellees from applying any doctrine of *adoption* or *ratification* on the strength of anything contained in the foregoing opinion of the Supreme Court of Illinois.

The same distinction is to be found in the cases of *Brown v. Crown Gold Milling Co.*, 150 Cal. 376, and *Thompson v. M. K. & T. Oil Co.*, 5 C. A. (2d) 117, both of which are cited by the appellees at pages 68 and 69 of their brief. A mere glance at these two cases will be sufficient to prove that in neither one of them can the appellees hope to find any refuge or support for the doctrine of adoption now advanced by them.

CONCLUSION.

On January 8, 1941, Merchants Ice was a going concern, operating as a public utility since 1890, and presently under the jurisdiction of the Railroad Commission of the State of California. It occupied approximately three square blocks, about three acres of ground and in excess of 1500 front feet on the Embarcadero in San Francisco, with spur track facilities. It was the oldest and one of the largest ice and cold storage plants in the west. It had suffered from a number of years of bad management and over a period of ten years, after allowing approximately \$70,000 per year depreciation, had suffered a loss of \$291,000. On December 31, 1940, it had total assets, after depreciation, of \$2,059,524.98, subject to a bond issue of \$659,000, and liabilities including said bond issue of \$878,388.48, leaving a net worth of approximately \$1,181,136.50 applicable to capital stock. After allowing \$20.00 per share on all preferred stock outstanding, being 41,615 shares, having a par value of \$10 per share and accumulated dividends of \$10 per share, or a total of \$832,300, there was as of December 31, 1940, a balance remaining of \$348,836.50, or a value of \$3.25 per share of common, and as of December 31, 1941, taken from the books of the company ten months after Bercut took over (the same valuations as to land, buildings and equipment being retained), a balance of \$371,332, or \$3.46 per common share. It owed some bills, and had always met them in the past, so it was not insolvent according to the accepted rules of business or law. After the "deal", the purported stupendous job of rehabilitation was

accomplished simply through receiving the \$25,000 paid out of the sale price for the controlling stock to Bercut and the advancement by Bercut of \$18,000 to settle the butter claim of the Bank of America. There was no showing that the Pacific National Bank was pressing the company (in fact, Mr. Gaither, president of the Pacific National Bank, testified that the loans of Merchants Ice were well secured, R. 504-505); that the P. G. & E. or the City and County of San Francisco were threatening or that the butter loss was anything other than an ordinary claim which might be expected in a large commodity warehouse business; its principal trouble was merely lack of confidence in management, which was the simplest thing to remedy. It required a cessation of plundering on the part of its board of directors and officers. Only a few new accounts were secured and yet almost immediately a continuation of the expected improvement was noted. After the outbreak of the war the year 1942 shows a phenomenal jump in activity and profits. This was done, we are told, by Bercut the director, the manager, the genius, the financial wizard, who for three years as the agent of the Holding Company sat on the board of Merchants Ice like a dummy and permitted its mismanagement to continue. After three years of study of the affairs of Merchants Ice by himself and his auditor, and with complete knowledge of the Merchants Ice affairs, he buys through his fellow directors, executive committee men and close associates, 12,495 preferred shares having a par value of \$124,950, and 65,863 shares of common having a book value of \$3.25 per share, and

a total value of \$214,054, plus accumulated dividends on the preferred shares of \$124,950, all for \$35,000. And this transaction is alleged to be in good faith, honest, at arm's length and for an adequate consideration.

And this Court is asked to sustain a judgment to the effect that such a transaction was fair and honest and that the judgment creditors and other creditors and more than ten thousand stockholders of the Holding Company are not entitled to complain.

This case comes to this Court on findings that are contrary to the evidence and are contrary to law. The judgment should be reversed.

Dated, San Francisco, California,
March 1, 1944.

Respectfully submitted,

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No. 10,550

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

7

THOMAS H. WINGATE, as Receiver in
Equity for Pacific Empire Holdings,
Incorporated (a corporation of the State
of Delaware),

Appellant,

vs.

PETER BERCU, HENRI BERCU, M. MAFFEL,
and L. R. ARNOLD,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

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FILED

JAN 26 1945



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PETER BERCUT, HENRI BERCUT, M. MAFFEI,
and L. R. ARNOLD,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Curtis D. Wilbur, Presiding Judge,
and to the Honorable Associate Judges of the
United States Circuit Court of Appeals for the
Ninth Circuit:*

The Appellant Thomas H. Wingate, as receiver in equity for Pacific Empire Holdings, Inc., a corporation of the State of Delaware, feeling himself aggrieved by the opinion filed in this Court on December 29, 1944, comes now and respectfully petitions the Court for a rehearing in the above-entitled cause, and in support thereof sets forth the following grounds:

GROUND'S FOR PETITION.

- (1) **THE COURT ERRED IN REFUSING TO CONSIDER APPELLANT'S CONTENTION THAT ON JANUARY 8, 1941 PETER BERECUT WAS A FIDUCIARY OF THE HOLDING COMPANY AND THAT THE TRANSACTION OF JANUARY 8, 1941 WAS AND IS VOID BECAUSE IT CONSTITUTED A BREACH OF TRUST BY A FIDUCIARY.**

The majority opinion of the United States Circuit Court for the Ninth Circuit appears to be premised on the concluding paragraph of the opinion by Stephens, Circuit Judge, that "since the evidence supports the finding that Bercut was not an officer or director of the Holding Company at the time he purchased the Merchants Ice shares, appellant's discussion of the fiduciary duties of corporate officers and directors is not in point".

It is respectfully submitted by the appellant that such a conclusion by the Court constitutes a denial, without consideration, of the very gist of plaintiff's cause of action, and is contrary to law.

The proposition before the Court was not so much whether or not Peter Bercut was an officer or director of the holding company on January 8, 1941, but rather whether he was a fiduciary of the Holding Company on January 8, 1941, and a determination of the question of whether or not he was a fiduciary of the Holding Company on said date is not at all dependent upon the proposition of whether the alleged oral resignation of Peter Bercut was legally effective to remove him from the office of officer and director of the Holding Company.

The real question before the Court was whether or not Peter Bercut continued to be a fiduciary of the Holding Company *even subsequent* to his alleged oral resignation because of his continuing relations to the Holding Company's subsidiaries and affiliated institutions. If, in fact, though not actually then an officer or director of the Holding Company, he nevertheless was a fiduciary of the Holding Company on January 8, 1941, by reason of his continuing relationship to it, then the legality of the transaction on January 8, 1941 is to be tested not by the ordinary rules of purchase and sale between strangers, as was done by the majority opinion in this case, but by the rules laid down in *Pepper v. Litton*, 308 U.S. 295.

A study of the above-entitled case cannot help but lead to the inevitable conclusion that from the inception of the alliance among defendants Maffei, Arnold and Bercut sometime between 1933 down through January 8, 1941, in one form or another, the three of them acted as a committee of management for the whole of the organization and Peter Bercut was not only an officer and director of the Holding Company and member of its executive committee clear down through and until the time that the trial Court found that he orally resigned, to Mr. Arnold, but also an officer and director of its subsidiary Pacific Empire Corporation, and at one time a director of its other subsidiary, California Pacific Service, Inc. In 1939, at his own request, he became a director of the controlled subsidiary Merchants Ice and Cold Storage Company, and of the affiliated banking institution,

Pacific National Bank of San Francisco, *representing the interests of the Holding Company in said corporations*. Under such circumstances Peter Bercut, by virtue of his own fiduciary relationship to all of the companies, acquired an intimate, confidential knowledge of the financial affairs and conditions of each of them and knew exactly the precarious nature of their existence. It is these circumstances that create the legal concept of what is designated a "fiduciary" and not the holding of any particular position or office.

The rule is well expressed in Section 2219 of the Civil Code of California, which provides:

"Everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control."

In the case of *Bradley Co. v. Bradley*, 37 Cal. App. 263, at 267, Kerrigan, J. says:

"From the facts narrated it certainly cannot be held that their relations were not confidential, nor that defendant was not the confidential agent of Bradley at the very time of the conveyance of the property. There are certain relationships from the existence of which the law infers special confidence, such as those of husband and wife, parent and child, guardian and ward, coun-

sel and client, etc., but it also exists in numerous cases where the facts proven will warrant the inference. (*Brown v. Mercantile T. & D. Co.*, 87 Md. 377 (40 Atl. 256); *Thomas v. Whitney*, 186 Ill. 225 (57 N.E. 808, 810); *Stepp v. Frampton*, 179 Pa. St. 284 (36 Atl. 177, 179).) If these parties had been married at the time of the creation of the trust, the law would have presumed the relationship to be confidential, and the oral trust, therefore, enforceable; yet here the evidence shows that the confidence reposed was greater before than after marriage. We think that the trial court's conclusion that there existed at the time of the conveyance a confidential relationship between the parties is abundantly supported by the evidence."

In *Bacon v. Soule*, 19 Cal. App. 428, at page 434, Lennon, P.J. states the rule in the following appropriate words:

"The law relating to the subject of confidential relations has been so often declared and is generally so well understood that a mere reference to its underlying principles will suffice for the discussion and decision of the paramount point presented upon this appeal. A 'confidential relation' in law may be defined to be any relation existing between parties to a transaction wherein one of the parties is duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence,

can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. A 'fiduciary relation' in law is ordinarily synonymous with a 'confidential relation'. It is also founded upon the trust or confidence reposed by one person in the integrity and fidelity of another, and likewise precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed. (Civ. Code sec. 2219; Meyer v. Reimer, 65 Kan. 822 (70 Pac. 869); Robins v. Hope, 57 Cal. 493.)

It is admitted that on January 8, 1941 Merchants Ice & Cold Storage Company was a controlled subsidiary of the Holding Company, in that the Holding Company owned, in the aggregate, more than a majority of the outstanding capital stock of Merchants Ice entitled to vote.

It is admitted that Peter Bercut (though, as found by the trial Court, he may have orally resigned as an officer or director of the Holding Company) never at any time resigned, but continued to serve as a director of Merchants Ice up to and including January 8, 1941, and thereafter, and that he was appointed to that office to represent therein the interests of the Holding Company.

It is also admitted that up to and including January 8, 1941, and thereafter, Peter Bercut continued to sit on the board of directors of Pacific National Bank of San Francisco, to which office he was appointed to represent the Holding Company's interest in said bank.

It is true that on January 8, 1941 Pacific National Bank of San Francisco was not, as in the case of Merchants Ice, a controlled subsidiary of the Holding Company, but it was an affiliated institution in the sense that the Holding Company, through its subsidiary Pacific Empire Corporation, owned a very substantial interest in said bank, and said bank was the banking connection not only of the Holding Company but also of Merchants Ice and Pacific Empire Corporation.

Certainly it cannot be argued that Peter Bercut lost contact with the affairs of the Holding Company or of Pacific Empire Corporation by the mere oral resignation to Mr. Arnold, because Mr. Arnold at the time continued as president of Merchants Ice and Mr. Maffei continued as vice president of Merchants Ice, and Mr. Bercut admits that Merchants Ice met regularly every month and that the Pacific National Bank of San Francisco's board of directors, in which he and Maffei represented the Holding Company, met regularly every month. All this is disclosed by the record, and therefore the relationship between Peter Bercut, Maffei and Arnold, and among the three of them, and with the various companies involved, was not at all changed in fact by the mere expression on the part of Peter Bercut to Arnold that he didn't want to have anything more to do with the Holding Company. It isn't what one says that counts in law so much as what one does, and when it is held that Mr. Bercut ceased being a fiduciary and stood in the position of a stranger to all of these companies by his said mere oral expression, then we cut across all

the safeguards which law and equity have laboriously and persistently created for the protection of corporations, their creditors and stockholders from injury and malfeasance by scheming or otherwise unfaithful agents.

If, technically, Peter Bercut was not an officer or director of the Holding Company on January 8, 1941 he, nevertheless, continued to be and to act *as its agent* in the general administration of its affairs, and especially in the management and conduct of the principal asset of the Holding Company, to-wit: Merchants Ice & Cold Storage Company.

And, as stated by Pomeroy—4th Ed. Equity Jurisprudence, Vol. 2—Sec. 959):

“Equity regards and treats this relation (of principal and agent) in the same general manner and with nearly the same strictness as that of trustee and beneficiary. The underlying thought is that an agent should not unite his personal and representative characters in the same transaction; and equity will not permit him to be exposed to the temptation, or brought into a situation where his own personal interests conflict with the interests of his principal and with the duties which he owes to his principal.”

This same fundamental rule is expressed in *Hemenway v. Abbott*, 8 Cal. App. 450, 97 Pac. 190.

It was held in *Robbins v. Hope*, 57 Cal. 493, at 497:

“The phrases ‘confidential relation’ and ‘fiduciary relation’ seem to be used by the courts and

law writers as convertible terms. It is a peculiar relation which undoubtedly exists between client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife (naming others). In these and the like cases, the law, in order to prevent undue advantage from the unlimited confidence, affection or sense of duty which the relation naturally creates requires the utmost good faith (*uberrima fides*) in all transactions between the parties." (1 Story's Equity Jurisprudence, Sec. 218.)

As further illustrating the meaning of these terms, it was held in *Thomas v. Whitney*, 186 Ill. 225, 230 (57 N. E. 808, at 810) that:

"The term fiduciary or confidential relation as used in this connection, is a very broad one. It has been said that it exists and relief is granted in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical, fiduciary relations and those informal relations which exist wherever one man trusts in and relies on another."

It has been held that one can be a fiduciary of a corporation without being an officer or director. It was so decided by the United States Sup. Co. in *Southern Pacific v. Bogert*, 250 U.S. 483, at 492, where in fact a situation of dominance was found to exist.

On this point we cite to the Court the learned opinion of Justice Rosenman rendered in the case of *Blaustein v. Pan American Petroleum & Trans-*

port Co., 21 N.Y.S. (2d) 651, at page 709, where, in discussing the influences which motivated the actions of the intercorporate officers and directors, he said, at page 709:

“Relationships, such as these men bore to the dominant corporation, are realities motivating business conduct, which loom up clearly to anyone intent on looking through the fog of intercorporate artificialities.”

The same Justice, at page 712, observed:

“The corporation which actually induces management action in its subsidiary will be treated itself as manager, and will be made subject to all the fiduciary obligations toward the subsidiary which are imposed on corporate directors themselves,”

citing, with approval, the case of *Southern Pacific Ry. Co. v. Bogert*, *supra*.

In *Hyams v. Calumet & Hecla Mining Co.*, 221 Fed. page 543, it was held:

“Breach of duty and abuse of fiduciary obligation do not necessarily involve ‘intentional moral delinquency’. If the act amounts to what the law considers a breach of trust, a disregard of duty, it is sufficient. *Dodge v. Woolsey*, 18 How. 331, 345, 15 L. Ed. 401. See *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 553, 15 S.Ct. 673, 39 L. Ed. 759. A breach of trust by one occupying a fiduciary relation, even while in the exercise of a lawful power, ‘is as fatal in equity to the resultant act or contract as the absence of the power’. *Jones v. Electric Co.* (C.C.A. 8), 144

F. 765, 771, 75 C.C.A. 631; 3 Clark & Marshall on Corporations, p. 2289."

As was said by Welsh, District Judge, in the elaborate opinion filed by him in the very recent case of *Overfield v. Pennroad Corporation*, 42 Fed. Supp. 586, at page 607,

"The existence of control is the important consideration, and not the means adopted, which creates the fiduciary relationship and the exercise of such control, regardless of the device employed, which fixes the liability."

In *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 599, it was held:

"The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation."

Therefore, it becomes apparent that the failure of Mr. Justice Stephens (concurring in by Mr. Justice Garrecht) to consider appellant's points as set forth on pages 90 et seq. of our opening brief constitutes a material error in law on the part of the Court, for the very reason that the entire case of appellant is predicated on the proposition that Peter Bercut, on January 8, 1941, was a fiduciary of the Holding Company, and if, in fact he was a fiduciary, then, under the rules of law as expressed in the cases cited in our opening brief at pages 90 et seq. then the question of adequacy of the consideration is at most secondary,

because it is elementary that a fiduciary has the burden of proving that he did not take advantage of his position; that he acted fairly, above board and with the full knowledge of all of the directors; and that he was dealing at arm's length and with the properly authorized officers and directors of the Holding Company. See the opinion of Mr. Justice William O. Douglas in *Pepper v. Litton* (supra), at page 306, and *Veesser v. Robinson, etc.*, 275 Mich. 133, 266 N.W. 54, wherein the Supreme Court of Michigan said:

“The rule which permits a director of a corporation (in other words a fiduciary) to deal with it, even in good faith, is limited to those cases where the corporation is represented by a quorum of disinterested directors or other independent officers or agent authorized to contract for it, *and, even then, the burden of showing the validity of the contract and the fairness and honesty of the dealings of the director with the corporation is on him.*”

Furthermore, a consideration of the nature of the transaction itself and the manner in which it was accomplished could only lead to the conclusion that defendants Maffei and Arnold were not themselves *disinterested* directors, representing solely the corporation, protecting only its interests, but were, in fact, interested only in preserving themselves and covering up their own defalcations. Otherwise it would seem reasonable that they would have tried to dispose of this substantial asset to others who had expressed an interest or desire to purchase it. Therefore, the corporation, in the transaction of January 8, 1941, was not

represented by disinterested directors properly authorized to act for it in the particular matter, and, assuming that Peter Bercut continued to be a fiduciary, by virtue of his continuing relation, then there certainly has been no compliance with either the mandate of our Supreme Court as laid down in *Pepper v. Litton* (supra) nor with the requirements of Section 311 of the Civil Code of California, or the decisions of the State of Delaware applicable to transactions by fiduciaries, which decisions have been cited in our opening brief.

(2) RULE 52(a) OF THE RULES OF CIVIL PROCEDURE DOES NOT NARROW THE POWER OF THE APPELLATE COURT TO REVIEW AND MODIFY FINDINGS OF FACT IN AN EQUITY CASE.

The majority opinion of the Court appears to be based upon the erroneous proposition that, by virtue of Rule 52(a) of the Rules of Civil Procedure the Appellate Court has not the right in this case to draw its own findings and conclusions upon a study of the entire case and review of all the evidence.

It is respectfully submitted that Rule 52(a) of the new Rules of Civil Procedure does not narrow the power of the Circuit Court of Appeals to review the findings of fact of a chancellor in an equity case, and to weigh the evidence and, if necessary, for the purpose of doing complete justice, to revise the findings.

It is true that under the new rules there is now only one form of civil action, and the new Rules of Civil

Procedure are applicable to both actions at law as well as in equity. But, as stated in Montgomery's Manual of Federal Jurisdiction and Procedure (Fourth Edition), at page 1137:

“The rule stated in the third sentence of Subdivision (a) (Rule 52) accords with the decisions on the scope of the review in modern federal equity practice.”

See also *Guilford Const. Co. v. Biggs* (4 Cir.), 102 Fed. (2d) 46 at page 47.

On appeals in equity, findings of fact made by the Court below are entitled to some weight, but are not binding on the Appellate Court. The whole case is before the latter Court and it is bound to decide the same, so far as it is in a condition to be decided, on its merits. It was so held in *Waterloo Mining Co. v. Doe* (C.C.A. 9th), 82 Fed. Rep. 45 at page 51, where this Court said:

“It is further urged by the appellees that this court is bound by the findings of fact of the Circuit Court, unless they are found to be clearly and palpably erroneous. On an appeal in an equity suit the whole case is before the Court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits. Beach Mod. Equity Practice, page 978; *Ridings v. Johnson*, 128 U.S. 212, 9 Sup. Ct. 72; *Garsed v. Beall*, 92 U.S. 684-695; *Johnson v. Harmon*, 94 U.S. 371.

If a case has been referred to a master, and he has made findings of fact, there ought to be exceptions to the same, if any party to the suit is dissatisfied therewith, and a ruling upon the same made by

the chancellor. If this course is not adopted, then findings cannot be reviewed on appeal. It is to be observed, however, that the findings of fact by the Circuit Court are not without some weight in considering the merits of the case. This case, therefore, is presented to this Court upon its merits, and must be considered upon the evidence with such aid as may be found in the findings of the Circuit Court."

See also *Simkins Fed. Practice* (Revised Edition), Sections 1016 and 1020, and the case of *Boynton v. Moffat Tunnel Imp. Dist.*, 57 Fed. (2d) 769 at 777.

That the proceeding here in issue is of an equitable nature there can be no doubt. The complaint, as a whole, seeks to set aside a transaction on the ground of invalidity, the restoration of property allegedly taken without right, and the impressment of a trust upon the property in question. The relief sought is clearly of an equitable nature, and, although the second and third causes of action are legal in nature, it is clear that they are mere outgrowths of the first cause of action, and are referable to it. The complaint must be looked at in its entirety to determine the nature of the cause of action pleaded and relief sought. So doing, it is obvious that the proceeding here in question is an equitable proceeding, imposing upon this Court "the duty to decide the same, so far as it is in a condition to be decided, *on its merits.*"

(3) THE FINDING OF THE TRIAL COURT THAT THE CONSIDERATION PAID BY PETER BERCUT WAS FAIR AND ADEQUATE IS CLEARLY ERRONEOUS.

The majority opinion of this Court states that: "In view of the evidence elicited, the finding as to reasonable value of the shares is not clearly erroneous." In his dissent, Wilbur, Circuit Judge, states that, in his opinion, the evidence shows that the consideration paid by Bercut to the Pacific Empire Holdings Incorporated was neither fair nor adequate and that the trial Court's conclusion on the facts was clearly erroneous.

We respectfully state that we are at a loss to understand how, under all the facts of the case, the nature of the evidence elicited on behalf of the appellees, whose duty, under the law, it was to prove payment of an adequate consideration and the existence of fair, open and above board dealing, could possibly be deemed sufficient to warrant the finding made by the trial Court on this point.

In the case now before the Court Pacific Empire Holdings, Inc., on January 8, 1941, owned 65,865 shares of common stock out of 107,188 shares outstanding, or approximately 63% of the common, and 12,495 shares of 7% cumulative preferred stock out of 41,615 shares outstanding, or approximately 30% of the preferred.

The par value of the preferred stock was \$10 a share, and as of December 31, 1940 the amount of unpaid accumulated dividends due thereon amounted to approximately \$9.57 a share.

It is admitted that these shares were not listed on any markets and that occasional sales of both common and preferred were made over the counter with the buyers generally either Pacific Empire Holdings, Inc. or Peter Bercut. As testified by Mr. Maffei, at page 181 of the transcript, there was little activity in the stock and once in awhile a few shares would be offered, and, to quote his own testimony, they (the Holding Company) would pick it up at the least possible price. (R. 182.) It is obvious and generally recognized that in such a situation the price at which such infrequent sales are made or the bid and asked prices posted is not any criterion or proper test of the intrinsic reasonable value of a block of stock such as is embraced in the transaction of January 8, 1941.

We have in the record on this point the uncontradicted testimony of H. R. Baker, an expert on securities, which reads as follows:

“Q. From your experience in unlisted securities are you in a position to state whether or not when a majority of the stock is owned by a concern and there are occasional sales transactions on outstanding stock, whether the market for such stock and such transactions reflect the true reasonable value of those securities?

A. Not necessarily. It all depends on where the control is and what kind of a control it is and what they are doing for the outside stockholders.

Q. Where a situation exists that the transactions are very rare and only involve a small number of shares, and the purchasing power, as it were, is limited to the controlling interest, would the price at which such securities would occasion-

ally be sold be a true reflection of the reasonable value?

A. I would say they would have no reflection on the reasonable value, unless the parties who were making the market wanted it such."

In order to determine whether or not Pacific Empire Holdings, Inc. received adequate consideration for the transaction entered into with the defendant Peter Bercut as expressed in the form of letter agreement under date of January 8, 1941, it is essential that this Court keep its eyes fixed not on any loose and irrelevant analysis of either the then alleged market value of the outstanding shares of Merchants Ice publicly owned and occasionally traded on the over-the-counter market, or the alleged intrinsic value of the underlying assets of the company broken apart and reduced to bare land, or bricks, mortar and machinery and sold under the hammer. Rather, this Court must approach the problem from an overall picture of the company as a "going concern" engaged for over fifty years in a vital public utility business under the regulation of the Railroad Commission of the State of California, occupying one of the choicest and most compact locations on the San Francisco Embarcadero, fed by shipping lines and railroad and spur track facilities unexcelled in any other part of the city, enjoying, through long periods of prosperity, or depression, by far more than half of the cold storage and ice business of this metropolis, and, according to all of the witnesses, about to enter into one of its most profitable periods.

We are not dealing here with mere book valuations. The valuations to which we shall refer are those used by the company and accepted by the Railroad Commission of the State of California as the basis of determining the invested capital used in the operation of the business.

It is obvious that the only equitable way for ascertaining the reasonable intrinsic value of the block of stock of Merchants Ice, embraced within the transaction of January 8, 1941, is through an analysis of the net worth of Merchants Ice applicable to its outstanding capital stock after giving effect to certain reasonable allowances which should be made upon consideration of all of the circumstances surrounding the company, its past operations, its then financial condition, its prospects for future improvement—all considered from the overall point of view that it is a going concern, not in course of liquidation, and that the block of stock in question constituted more than a majority of the outstanding capital stock, thus assuring perpetual control over its management.

In such a case the true and just rule of valuation is expressed in *Gerdes on Corporation Reorganization*, Sec. 93, page 245, where the learned author states:

“In a number of decisions it has been held that the going concern value of an active business must be considered in determining the fair value of its property. Fair value is not the value of the property after its going concern value has been reduced or destroyed by the intervention of bankruptcy proceedings, or by a levy and execution on the property of the debtor.”

In the case of *In re Gibson Hotels, Inc.*, D. C. 24 Fed. Supp. 859, 863, involving a case of valuation under the Bankruptcy Act, the Court said:

“The ‘fair valuation’ contemplated by the statute is not the value at which such assets could be converted into cash on a distressed market or at forced sale, but is the value of the assets taken in their relationship to the business of the hotel as a going concern. *In re Bucyrus Road Machinery Co.*, 6 Cir., 10 F. (2d) 333; *In re Nathanson Bros. Co.*, 6 Cir., 64 F. (2d) 912. To apply this test of value to a hotel property, it is necessary to take into consideration all of the elements entering into the intrinsic, as well as the selling value of the real estate, and also the earning power of the property.”

In the case of *In re Crystal Ice & Fuel Co.*, 283 Fed. 1007, at 1009, the Court laid down the following rule in determining valuation:

“Salable value and fair valuation are not synonymous, and the conclusion ‘wholly insolvent’ because of the fact that the ‘salable value’ of the company’s property was less than its debts may be and is proven to be not at all the insolvency of the Bankruptcy Act, viz. Insufficiency of its property at fair valuation to pay its debts * * * That is, although his property be not presently salable for enough to pay his debts, its fair valuation may be more than enough; and if so, he is not insolvent nor subject to bankruptcy for insolvency.”

In the very recent opinion from our District Court of Appeal of California, First District, handed down

March 3, 1944, in the matter of the sequestration of the Pacific States Savings & Loan Company by the California Building & Loan Commissioner, Justice Ward, speaking for the Court, on the contested point of whether or not the trial Court was justified in refusing consideration of "going concern" value in determining the fair value of the assets of the sequestered company, said:

" 'Going concern' may not be strictly defined to fit all cases. It is sufficient to say that ordinarily any element that tends reasonably and legitimately to enhance the value of property rights based upon the existence of the business in which they are involved, may be taken into consideration in ascertaining the full value of those rights. Reasonable discretion should be used in determining the meaning of this term as in the case of determining any market value; fair market, cash, actual cash, full cash, true cash, intrinsic, normal or other designated values not defined by the governing statute.

The difference between 'going concern' and 'cash' value is of paramount importance in this case. It is the difference between a business operating in an orderly manner, whether under good or difficult conditions, and with the chance of working out in case of the latter, and one suddenly arrested, the immediate result of which is to eliminate the element of going concern, and to place assets at the mercy of speculators regardless of the interests of certificate holders who are vitally concerned in whether their investment shall be given a chance to survive."

That the control feature of a block of stock is to be considered as a factor in determining the reasonable value thereof goes without question. It was so held in the very pertinent and parallel case of *Potter v. Sanitary Co. of America*, Del. Chanc. 1937, 194 Atl. 87, where the rule is laid down as follows:

“The only testimony the defendant has offered relates to the value of Sanitary stock when it was sold to Sanitary. That testimony is that recent sales of the stock showed it to have a market of not over two dollars per share. Hence, they say, the price received by Consolidated was a fair price. But even a fair price cannot justify corporate officers in making a sale if the purpose and effect of the sale is to advantage themselves either in position, power or profit to the disadvantage of the corporation they represent.

Was the price, however, a fair one, in view of the circumstances? The defendant refuses to allow any value to Consolidated’s block of Sanitary stock on account of the control of Sanitary which the block carried. *In this they are wrong.*”

In arriving at a determination of the net worth of Merchants Ice allocable to its outstanding capital stock and the block of shares in question, the only true, reasonable and fair means of approach is by analyzing the annual reports of the operation and financial worth of this company prepared by such reputable accounting firms as Haskins & Sells, which audited the books during the years 1936, 1937 and 1938—and John F. Forbes & Co. which made an audit as of December 31, 1939, and comparing these audits with

the financial report of the company dated December 31, 1940, the last of which, on February 19, 1941, was sent out to the stockholders of the company by none other than the defendant Peter Bercut.

The audit report of the company made by Haskins & Sells for the year 1938 is to be found at page 405 of the record in the testimony of A. W. Haynes, a member of the firm. He there testified that the total assets of the company on December 31, 1938, amounted to \$2,153,809.33, and that all of the liabilities of the company, current and fixed, and other charges, aggregated \$882,894.63, leaving a net worth allocable to the preferred and common stock as of December 31, 1938 of \$1,270,914.70. This was equivalent to \$18.17 for every share of preferred stock outstanding, leaving a balance of \$514,764.70 of equity assets available to the common stock, or \$4.80 per outstanding common share.

Now, it is true that these are book values, but as pointed out by Mr. Haynes, at page 407 of the transcript, they were sound values acceptable to the Railroad Commission for rate purposes, and arrived at as follows:

“Q. Now, in arriving at the net worth of the company upon what were the values of land, buildings and equipment arrived at, that is, what was the formula used?

A. The value of the land and what we generally term the fixed assets was based on an appraisal made by the American Appraisal Company in 1927. To that had been added subsequent additions and there had been deducted retirements up to December 31, 1938.

Q. That is the land?

A. That includes the land, buildings, machinery, equipment, fixtures, and other terms of property.

Q. Now, what formula was used in determining the depreciation on all of these buildings and equipment?

A. At the time the American Appraisal Company made its appraisal in 1927 it recognized what is termed a composite rate of $3\frac{1}{4}$ per cent, and the company followed that rate of depreciation throughout the period with which I am familiar at least.

Q. Let us take 1938. Was the amount of depreciation allocated the concern for the year based upon that formula?

A. For 1938 the provision for depreciation amounted to \$73,614.24.

Q. In 1937 how much was the provision for depreciation?

A. It was something less—\$600 or \$700 less. I can give you the exact figures for 1937; the provision for depreciation was \$72,486.71.

Q. Now, in arriving at the net worth of the company as of December 31, 1938 how much depreciation had been taken on the buildings, machinery and equipment up to that time?

A. In the aggregate the reserve for depreciation as of December 31, 1938 amounted to \$1,185,957.71.

Q. Leaving a net value, in other words, for buildings, machinery and equipment on December 31, 1938 of what figure?

A. Exclusive of land?

Q. Exclusive of land.

A. \$1,083,094.70.

Q. Now, the land was carried at what figure?

A. \$890,608.55.

The net worth of the company as of December 31, 1939, as shown by the audit of John F. Forbes & Company (Pl. Ex. 38, R. 521) was \$1,253,150.94, or \$17,763.76 less than the net worth as of December 31, 1938. This reduction reflects an operating loss for the year, after making allowance for depreciation in the sum of \$74,852.67 in that year. (R. 523.)

No audit of the operations of the company for the year 1940 was made, but the defendant Peter Bercut, who had become president of the company following his acquisition of the shares in issue on January 8, 1941, sent a financial report to the stockholders, which is dated February 19, 1941, and found at pages 368 and 369 of the record. In that report he states that the net worth of Merchants Ice, as of December 31, 1940, was \$1,199,136.50, after making due allowance for all charges, including depreciation of over \$70,000.00 for the year and all accumulated surplus deficits.

If we allot to the 41,615 shares of preferred outstanding the sum of \$19.57 a share, being the par value, and all accumulated dividends, or an aggregate of \$814,405.55 we still have a balance of \$384,730.95 of such net worth allocable to 107,188 shares of common stock outstanding, or approximately \$3.50 per share. On this basis the 12,495 shares of preferred stock delivered to Bercut on January 8, 1941 had a

book value of \$244,527.15, and the 65,865 shares of common delivered to Bercut had a book value of \$231,186.15, or an aggregate book value of \$475,713.30.

It is true that for 8 or 9 years during the depression and continuing right through 1940, while under the management of these very defendants, the company showed a continuing operating loss in its business reflected in an earned surplus deficit of \$216,588.50 by December 31, 1940. (See R. 373.) But, if we consider the fact that during these same years the company had charged off, as an expense, an average of almost \$70,000.00 a year in depreciation alone on its plant and equipment, this earned surplus deficit loses much of its significance. Also, one must consider the fact, and never forget it, that during all of these years the management of this company by these defendants was no different than their management of the rest of the companies. In other words, it was a case of spoliation, and yet in spite of all of the mismanagement and all of the looting and spoliation, this company at no time, even during the bottom of the depression, when all of its competitors were going under throughout the United States, ever defaulted in the payment of any of its obligations or in the payment of its interest or of the principal due on its outstanding bonds. Every obligation at all times was met as it matured, at the expense, it may be, of its working capital, but nevertheless met.

The fairest and most objective analyses of the value of the block of stock delivered by the defendants

Maffei and Arnold to the defendant Bercut was made by the witness Wm. F. Morrish, president of the Bank of America from 1931 to 1934, formerly president of the First National Bank of Berkeley, and at the time president of the American Toll Bridge Company. Mr. Morrish had been appointed chairman of the directors of Merchants Ice in 1938 at the behest of Crocker First National Bank of San Francisco—trustee under the bond indenture. He was appointed for the purpose of protecting the rights of the bondholders. He was a wholly disinterested witness. He owned no stock in any of the companies involved.

At page 453 of the record he states that during his term of office as chairman of the board of Merchants Ice he observed and watched closely the activities and progress of this company and kept a “running record of its activities” so that he could report to his people—the bondholders.

At page 457 he testified that during the period he was chairman of the board the condition of Merchants Ice showed steady improvement. In 1940 he was asked by defendant Arnold to make a loan of \$3000.00 to the Holding Company, which he did, secured by 1500 shares of Merchants Ice, and on page 458 of the record he states that he considered this to be ample security for the loan. In other words, in 1940, a few months before the Bercut transaction, Mr. Morrish made a loan equal to \$2.00 a share on 1500 shares of common stock of Merchants Ice, and he, a banker, thought it was ample security. On pages 458 to 461 of the rec-

ord Mr. Morrish gave the following testimony bearing on the value, as of January 8, 1941, of the block of shares here in issue:

“Q. Will you please state, Mr. Morrish, from the records that you have kept in your own handwriting, as I have observed, and from the financial reports of the company which you have examined, and from your own knowledge of the condition of this company what in your opinion was the reasonable, fair net worth of this company at the end of the year 1940, after making full allowance for all of its obligations and liabilities?

A. Well, I would have to refer to some figures that I have here.

Q. Will you please state to what you are referring?

A. As I stated, I have kept a running account of the comparison of the assets and liabilities of the company, and figured that the company in 1940 was making progress and that we were just on the verge of going into a period of very good times when it was sold. The figures that I have got down here were what I called distress figures, and figures that I believe the company could have liquidated for.

Q. By the company you mean the Merchants Ice & Cold Storage Company.

A. The Merchants Ice & Cold Storage Company, yes. The assets as I wrote them down were \$1,576,000.

Q. At what time?

A. I reduced the land values down to \$700,000 as compared with the book value of \$865,000. I

am just giving the regular figures, not the odd figures. The buildings I reduced from \$1,003,000 down to \$750,000, and the real estate—there was a small item of other real estate that I put in at \$20,000. The cash, of course, was the accounts receivable, the same, because they had already set up a reserve for loss, and the bottles that they had for sale, which were later sold at \$7,500, giving me a total of \$1,576,000. That is a reduction in the assets as shown by the books of over \$400,000—between \$400,000 and \$450,000.

Now, on the liabilities side, I figured the bonds had to be paid in full at \$659,500. There was an indebtedness to Pacific Empire of \$9,500, which I included, and mortgage on other real estate of \$12,000; notes payable \$3,200; accounts payable \$160,000, and a reserve for contingencies \$15,000, or a total of \$859,000. Now, that left a net value or a knockdown value, as I expressed it, of \$716,000. I considered the preferred stock was probably worth its book value.

Q. That is \$10 a share?

A. \$10 a share.

Q. Par value, you mean by saying 'book value'?

A. The par value, not the book value. That left in the neighborhood of \$300,000 value for the common stock."

The method used by Mr. Morrish in arriving at his valuation is to be found in Defendant's Exhibit E on page 471 and Defendant's Exhibit F on page 474 of the record.

Defendant's Exhibit F is the so-called running record kept by Mr. Morrish, and it is interesting to study it for it proves how accurate were his observations and how fair his approach to the problem. It is a running record by months, skipping only the month of July in 1940. His Exhibit E is a breakdown of the assets of the company as of December 31, 1939, and his own independent valuation of these assets. He there appraises the value of the assets of the company at less than their book value. He reduced the book value of the land from \$865,608.55 to \$700,000.00, and the book value of the buildings from \$1,003,302.97 to \$750,000.00. In addition to that he throws out, as valueless, an item of \$26,477.40 carried as "Investment not Secured"; an item of \$23,874.94 due from Globe Brewing Company, then bankrupt, and an item of \$59,772.25 carried under "deferred charges", or an aggregate reduction of \$536,988.53 in the book value of these assets. After making this arbitrary reduction in valuation, which he thought was fair and reasonable, considering the past history of the company's operations, the net actual—as distinguished from book—value of the assets of the company were found by him to be \$1,576,059.97, and deducting therefrom all of the liabilities of every kind and character aggregating \$859,826.96 there was left a net value applicable to the outstanding preferred and common stock of \$716,233.01. *At page 479 of the record Mr. Morrish testified that his valuation was a liquidating valuation.* In other words, in the event of liquidation, according to Mr. Morrish, the net value of the equity

assets would be equal to approximately \$17.50 per preferred stock outstanding and thus the 12,495 shares of preferred stock delivered to Bercut under the agreement of January 8, 1941 would be reasonably worth approximately \$216,000, while the common stock would have no liquidating value but would have an intangible value based upon the fact that it represented control.

But, as we have said before, this was not a liquidating business. This was a business that had been going on for over 50 years and was about to enter into one of its most prosperous times, as Mr. Morrish testified on page 486 of the transcript. Mr. Arnold testified (R. 881) that the general condition of the company at the end of 1940 "was better", and the report sent out by Mr. Bercut at the end of his first year of operation proves it. Therefore, we cannot take the liquidating values placed on these assets as a fair criterion of their true worth. Rather, following the rules of valuations hereinbefore cited, we should add to the valuation made by Mr. Morrish the additional value created by virtue of the fact that the company was a going concern which had successfully weathered a stormy career and was just entering a period of renewed prosperity, and the further consideration that the block of stock in issue represented more than a majority of the shares outstanding. These factors fully justify the reasonable and conservative valuation of Mr. Morrish and fully warrants the testimony given by him at page 498 of the record where he testified as follows:

“Q. In other words, you are now stating for the purpose of the record in your opinion anyone who paid the equivalent of \$2.80 a share for 65,000 shares of common and \$10 a share for 12,000 shares of preferred from the Pacific Empire Holdings on January 8, 1941, would have paid a fair price?

A. Yes.”

Finally, let us briefly, analyze the testimony of appellee's witness, Louis T. Samuels.

Mr. Samuels' task was simple. He came to Court with the preconceived intent of testifying to a value of \$1.00 per square foot for the property of Merchants Ice. Let us consider some additional facts. Here is the largest single parcel of private property on the San Francisco Embarcadero. Unexcelled spur track and shipping facilities, both indispensable to a cold storage plant; over three acres of ground space, occupied with specialty buildings adapted to their particular requirements; a going concern in existence for fifty years. To what does Mr. Samuels compare this consolidated operating unit? Principally to spur track property and government storage property located not down by the Merchants Ice plant, but over by Fisherman's Wharf where the government has engaged in great activity since the war. Examination of the parcels used for comparison (R. p. 660) clearly shows these facts. With only two parcels is Mr. Samuels familiar. One, with a 68-foot frontage, with a sixty-year-old building (and according to his testimony (p. 660) such a building is valueless) he sold

to his brother for \$10,000.00, or \$145.00 a front foot. The Merchants Ice property has over 2200 feet of street frontage. (See Ex. M, p. 657.) The other property (R. 668-669) he calls a block. It had 500 feet of street frontage with 17,000 square feet of land, improved with a cracked and obsolete building. He sold it for \$14,500.00, or \$290.00 a front foot. On cross-examination, he reveals that the property produced about \$1500.00 a year gross income after taxes, but before insurance, maintenance, depreciation, etc. Although Mr. Samuels calls it a block it is really only a large lot approximately 130 x 130 and obviously it sold on an income basis of about 10% a year gross after taxes.

Mr. Samuels entirely ignores the plottage value of owning a single unit covering nearly three blocks improved with buildings adopted to the business. Having determined on \$1.00 per foot he sticks to it through thick and thin. Yet if we consult Mr. Samuels' summary (pp. 657, 658) we find he is not unaware of going concern value, because, although in his analysis on pages 659 and 660 he considers items 2, 3, 5, 7 and 8 obsolete and almost valueless, he nevertheless appraises the improvements on those parcels for \$153,000.00.

Illustrative of the wholly unreliable character and worthlessness of the testimony of witness Louis T. Samuels is this glaring and irrefutable point, namely: The trial of this action began April 20, 1943, or more than three years after the deal with Bercut. In defendants' Exhibit "M" page 657 of the Record, we

have Mr. Samuel's valuations, under date of April 16, 1943, wherein he says, substantially, that the aggregate value of the properties listed by him in said letter as of January 8, 1941, were \$548,559. *But at Record page 664 Mr. Samuels admits that his appraisal did not include any of the machinery and equipment in all of these buildings, and, obviously, he gave no effect to the concern as a going business, in spite of the fact that this very company, these very properties were adequate to take care, in 1942, of a volume of business amounting to \$846,821.06, and result in a net profit to the company of \$156,401.98, after all charges, including depreciation, on the same buildings, machinery and equipment, of \$77,124.68 for the year.*

Let us consider here the Evans adjustment of accounts receivable. Appellees vehemently deny the Bercut sale rendered his vendor insolvent. Why then the charge-off of the vendor's account receivable? Here they are blowing hot and cold. If appellant was solvent, the account was good—if appellant was not solvent the charge-off was justified. The answer, of course, is that the account was good as long as appellant had the stock of Merchants Ice as an asset and only so long. The write-off was justified after the Bercut sale *and because of it.*

Finally, Mr. Evans and appellees' brief make no reference to the \$26,500.00 reserve for bad accounts and the \$15,000.00 reserve for contingencies which were ample provision for bad accounts if the Holding Company account was good, which it was prior to the Bercut deal.

Finally, since candor is due the Court, let us examine the comparative balance sheets at December 31, 1940, and December 31, 1941. (p. 371, Pl. Ex. 32.) This is the balance sheet prepared at the end of the first year of Bercut control. Where are any of the adjustments so vehemently argued in appellees' brief? Let us examine Exhibit for Plaintiff No. 33 (p. 374), being the balance sheet at the end of 1942, and still we find no such adjustment. How can the publication of those balance sheets be reconciled with the claims of the appellees with respect to the necessity of such adjustments? Either the present management of Merchants Ice is misrepresenting facts or appellant's contentions are justified.

According to the balance sheet prepared for Peter Bercut at the end of 1941 (p. 371) the common stock at December 31, 1940, had an equity in substantial assets of \$782,982.50 or \$7.30 per share. If provisions for dividend arrearage on the outstanding preferred stock be made, the equity behind the common stock is reduced to about \$3.25 per share, on which basis, of course, the preferred stock increases in value to \$20.00 per share. In other words, according to the statement prepared by the Bercut management, the stock Bercut received from Maffei and Arnold had a book value at December 31, 1940, before provision for dividends in arrears, as follows:

12,495 shares	preferred at \$10.00	\$124,950.00
65,683 "	common at 7.30	480,799.90

after providing for preferred dividends in arrears:

12,495 shares	preferred at \$20.00	\$249,900.00
65,683 "	common at 3.20	214,054.75

Assuming, without conceding, some adjustment should be made because of possible overstatement of assets or understatement of liabilities, the adjustment in total never could equal an amount sufficient to cause the Holding Company's equity ratio of the adjustment to reduce the value of its holdings to the ridiculous sum of \$35,000.00.

It is, of course, true that because of the depression from 1929 to 1933, and as a result of the mismanagement of the company by these very defendants, the working capital of Merchants Ice had been depleted and it temporarily faced a period where it was compelled to defer some of its immediate obligations. But this condition did not at all impair the solvency of the company as proven by the testimony of Mr. Gaither, president of Pacific National Bank, who substantially testified, at page 503 of the Record, that the loans of the company were in good standing and that he was not worried about them. Nor can it reasonably be said that this temporary tight working capital situation had the effect of destroying the intrinsic net worth of the company, or the basic values of its assets, and this is proven by the fact that as soon as the defendants Maffei and Arnold left the company and the defendant Peter Bercut took over the management, all of the pressing financial problems that the respondents so exaggerate in their brief seem to have evaporated and the company began to show profits instead of losses.

The failure of the trial court to give adequate consideration to these irrefutable facts renders its finding on this phase of the case clearly erroneous.

CONCLUSION.

It is respectfully submitted that a rehearing should be granted.

Dated, San Francisco, California,
January 26, 1945.

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*Attorneys for Appellant
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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
January 26, 1945.

A. J. SCAMPINI,
*Of Counsel for Appellant
and Petitioner.*

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